

P. 361

POST CONVICTION

FROM:

179TH DISTRICT COURT

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COURT OF CRIMINAL APPEALS

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JUAN BALDERAS
1412826-A

APPLICANT

VS.

THE STATE OF TEXAS

RESPONDENT

VOLUME 7 OF 22

CAUSE NO. 1412826-A

EX PARTE	§	IN THE 179 th DISTRICT
	§	COURT OF
JUAN BALDERAS,	§	HARRIS COUNTY, T E X A S
Applicant		

**STATE'S PROPOSED SUPPLEMENTAL ORDER DESIGNATING ISSUES
TO BE RESOLVED VIA EVIDENTIARY HEARING**

Based on this Court's review of the habeas record and the argument of counsel, this Court **FINDS** that the following controverted, unresolved factual issues potentially material to the legality of the applicant's confinement will be addressed by means of a narrowly tailored evidentiary hearing:

- to assist the Court in resolving the issue of whether the State either knowingly or unknowingly presented false testimony at trial through Israel Diaz, this Court will permit the applicant to attempt to present the testimony of Israel Diaz specific to whether Diaz is recanting his trial testimony, whether Diaz was pressured by the State pretrial to "change" his testimony, and whether Diaz testified falsely under oath at the applicant's trial; and
- to assist this Court in resolving the issue of whether trial counsel was ineffective for failing to investigate and present evidence of an alibi defense during the guilt/innocence phase of trial, this Court will permit the applicant to present the testimony of Anali Garcia and Octavio Cortes limited to what these witnesses would have stated if called to testify during the guilt-innocence phase.

Therefore, this Court **ORDERS** an evidentiary hearing to resolve these issues pursuant to **TEX. CRIM. PROC. CODE** art. 11.071 §§ 9, 10.

The Clerk of the Court is **ORDERED** to transmit the Court's instant supplemental order designating issues to the Court of Criminal Appeals.

The Clerk of the Court is **ORDERED NOT** to transmit any additional documents in the above-styled case to the Court of Criminal Appeals until further ordered.

By the following signature, the Court adopts the State's Proposed Supplemental Order Designating Issues to be Resolved via Evidentiary Hearing in Cause Number 1412826-A.

SIGNED this _____ day of March, 2018.

The Honorable Baylor Wortham
Presiding Judge by Assignment
179th District Court
Harris County, Texas

**IN THE 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS**

_____	)	Trial Cause No.
EX PARTE	)	1412826-A
Juan Balderas,)	
APPLICANT)	
_____)	

**MOTION FOR EXTENSION OF TIME TO PREPARE FOR
EVIDENTIARY HEARING**

Juan Balderas, through his attorneys the Office of Capital and Forensic Writs (OCFW), requests this Court grant an extension of time to prepare for evidentiary hearing. For the reasons set out below, good cause exists to justify the granting of an extension to May 11, 2018, in order to allow counsel for Mr. Balderas adequate opportunity to prepare for the evidentiary hearing.

On February 26, 2018, the OCFW and the Harris County District Attorney's Office were contacted by the Court's coordinator regarding scheduling of the evidentiary hearing as early as April 4, 2018. The OCFW respectfully requested an evidentiary hearing date on or after May 10, 2018, due to scheduling conflicts beyond the control of Mr. Balderas's counsel. Specifically, the conflicts include a filing deadline in mid-March for an initial application in a case involving 25

terabytes of discovery; an oral argument in late March; and an evidentiary hearing in Hunt County scheduled for late April that is expected to last at least one week.

Under Texas Code of Criminal Procedure article 11.071, this Court is authorized to grant an extension to an applicant seeking an evidentiary hearing. TEX. CODE CRIM. PROC. art. 11.071 § 9(b). The Court may do so if it finds good cause exists. *Id.* In light of the OCFW's obligations in other cases, including the multiple conflicts prior to May 11, 2018 detailed above, good cause exists in this case to allow for a reasonable delay for this evidentiary hearing.

As the state agency charged with representing capital defendants in their state habeas proceedings, the OCFW, which is located in Austin, Texas, accepts appointment to cases that have resulted in a capital sentence after September 1, 2010. Writ proceedings in these cases typically take place in the trial courts in which the cases were originally tried; therefore, counsel represent clients in court proceedings in counties across the State of Texas. The OCFW staff works diligently to provide the highest caliber representation to each of its clients.

While counsel for Mr. Balderas focus on the litigation of this evidentiary hearing, they also must devote attention to other cases with equally pressing deadlines, many of which were set prior to the February 22, 2018 status hearing at which this Court granted an evidentiary hearing, and all of which require travel to other counties to appear in court on behalf of clients. Counsel for Mr. Balderas make

this extension request in good faith and because they require the additional time to prepare adequately for the evidentiary hearing.

PRAYER FOR RELIEF

For the foregoing reasons, Applicant prays this Court would grant the extension of the evidentiary hearing to May 11, 2018.

Respectfully submitted,

DATED: March 9, 2018

/s/ Katherine Froyen Black

ERIN M. ECKHOFF (No. 24090910)
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KATHERINE BLACK
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Attorneys for Mr. Balderas

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing Motion for Extension of Time to Prepare for Evidentiary Hearing to:

Criminal Post-Trial
Harris County District Clerk
1201 Franklin Street, Suite 3180
Houston, Texas 77002

Judge Baylor Wortham
Jefferson County Courthouse
1085 Pearl Street
Beaumont, TX 77701

Harris County District Attorney
c/o Farnaz Faiaz Hutchins
1301 Prairie, 5th Floor
Houston, TX 77002

This certification is executed on March 9, 2018 at Austin, Texas.

KATHERINE FROYEN BLACK

IN THE 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS

EX PARTE
Juan Balderas,

APPLICANT

) Trial Cause No.
) 1412826-A
)
) [PROPOSED] ORDER
)
)

ORDER

On this date, the Court considered Applicant's Motion for Extension of Time to Prepare for Evidentiary Hearing. After due consideration, Applicant's Motion is GRANTED. The evidentiary hearing will begin on May 11, 2018.

ORDERED AND SIGNED on this ____ day of March, 2018.

The Honorable Baylor Wortham
Judge Sitting by Assignment,
179th Judicial District Court

**IN THE 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS**

_____	)	Trial Cause No.
EX PARTE	)	1412826-A
Juan Balderas,)	
APPLICANT)	
_____)	

**MOTION FOR
AN ORDER DESIGNATING ADDITIONAL ISSUES FOR FURTHER
FACTUAL DEVELOPMENT**

Mr. Balderas, through his counsel, hereby moves this Court for an Order Designating Additional Issues for Further Factual Development.

At a status hearing that took place on February 22, 2017, and via a follow-up electronic communication to counsel for both Mr. Balderas and the State, this Court ordered both parties to submit proposed supplemental orders designating several additional issues identified by the Court as requiring further factual development to take place via live testimony at an evidentiary hearing, pursuant to Texas Code of Criminal Procedure Article 11.071, section 9(a). *See* February 22, 2017 Writ Hearing Transcript, attached hereto as Exhibit A, at 60.

Accordingly, Mr. Balderas, through his counsel moves this Court for an order designating the following issues for further factual development via live evidentiary hearing:

A. Mr. Balderas's First and Second Grounds for Relief: That His Due Process Rights Were Violated When the State Obtained a Guilty Verdict Through the Knowing Use of False Evidence Under *Giglio* and *Napue* and/or Through The Use of False Evidence Under *Chabot* and *Chavez*

Mr. Balderas requests this Court issue an order designating further factual development, via live evidentiary hearing, of the whether a key State's witness at trial, Israel Diaz, testified falsely against Mr. Balderas.

B. Mr. Balderas's Fourth Ground for Relief: That His Trial Counsel Were Ineffective at the Guilt/Innocence Phase of His Trial For Failing to Investigate and Present Alibi Evidence

Mr. Balderas requests this Court issue an order designating further factual development, via live evidentiary hearing, of whether his trial counsel rendered ineffective assistance of counsel at his trial when they failed to investigate and present evidence of Mr. Balderas's alibi, including the testimony of key alibi witnesses Anali Garcia and Octavio Cortez.

Mr. Balderas respectfully requests this Court issue an order designating the above issues for further factual development via live evidentiary hearing.

Respectfully submitted,

DATED: March 9, 2018

/s/ Katherine Froyen Black
KATHERINE FROYEN BLACK

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Attorneys for Mr. Balderas

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Houston, TX 77002

This certification is executed on March 9, 2018 at Austin, Texas.

/s/ Katherine Froyen Black
KATHERINE FROYEN BLACK

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 1412826-A

EX PARTE, JUAN BALDERAS) IN THE DISTRICT COURT
)
)
vs.) HARRIS COUNTY, TEXAS
)
)
STATE OF TEXAS) 179TH JUDICIAL DISTRICT

WRIT HEARING

On the 22nd day of February, 2018, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Baylor Wortham, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

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Counsel for the Defendant

P-R-O-C-E-E-D-I-N-G-S

THE COURT: So everybody ready to proceed?

MS. ECKHOFF: Yes, sir.

MS. HUTCHINS: Yes.

THE COURT: The Court will call Cause No. 1412826-A, ex-parte, Juan Balderas. I'll note for the record that Mr. Balderas is present in the courtroom this afternoon.

Counsel, since we are on the record, can I have each of the attorneys identify themselves for the court reporter and your respective clients, please.

MS. HUTCHINS: Farnaz Hutchins, spelled F-a-r-n-a-z; last name Hutchins, H-u-t-c-h-i-n-s. For the State.

MS. REAGIN: Shawna Reagin, S-h-a-w-n-a R-e-a-g-i-n for the State of Texas.

MS. ECKHOFF: Erin Eckhoff with the Office of Capital and Forensic Writs on behalf of Mr. Balderas.

MS. BLACK: Katherine Froyen Black, from the Office of Capital and Forensic Writs for Mr. Balderas, as well.

THE COURT: Well, Counselor, I know, just procedurally -- I guess we can kind of address this. We're here for, I guess, essentially a status conference is how he would probably label it. I know because we've

1 had a substitution of judges on this case, it takes some
2 time for -- obviously for myself to get a little bit
3 more familiarized with the case and also to kind of come
4 back and readdress certain issues.

5 So my goal here this afternoon isn't to
6 readdress necessarily all of the issues that were
7 covered in the prior hearing. I know that was a very
8 lengthy hearing and I was able to review the record.
9 And I think most of the statements that I think you have
10 speak for themselves.

11 So, my goal is to cover some of these
12 issues in more of a cursory manner. From the onset,
13 I'll note in the filings that each of the parties
14 submitted that it's very apparent from the record that
15 the respective attorneys in this case have worked very,
16 very hard and diligently on this, both the counsel for
17 Mr. Balderas and the counsel for the State. It's very
18 evident from the filings and the work product of the
19 attorneys that both counsel genuinely care about this
20 case. It's very important to them. So I want to
21 commend each of the attorneys for the outstanding
22 representation you've shown your respective clients from
23 the get-go.

24 And I say that, having dealt with a lot of
25 bad lawyers. It's very refreshing to actually see some

1 good lawyers that do good work on a case. I do want to
2 commend each of you for the work that you have put forth
3 into the case and are continuing to do so, thus far.

4 Getting somewhat into the crux of the
5 matter, I know, Ms. Eckhoff, you filed a request, asked
6 for a live evidentiary hearing on a litany of issues.
7 So, they're somewhat voluminous, but I'll consolidate
8 those. From the get-go, we have issues relating to
9 recanted testimony or the alleged false testimony of two
10 witnesses, Mr. Israel Diaz and Mr. Christopher Pool.
11 There's also an issue relating to Brady disclosure of
12 impeachment evidence, although I think technically that
13 would be under the category of Giglio, but I think it's
14 still under the same parameters. Multiple issues
15 relating to ineffective assistance of counsel, issues
16 pertaining to jury's exposure to outside influences.
17 And then another category, which I would, I guess, label
18 as constitutional law issues relating to jury charge and
19 voir dire and other aspects such as that.

20 So, one of the things that I noted at the
21 get-go was the dispute about whether or not there's a, I
22 guess, mandatory or obligatory right to have an
23 evidentiary hearing to develop some of these matters.
24 Having read the State's response, I think there's merit
25 in their response in that the Supreme Court case law

1 recited by counsel for Mr. Balderas was really more
2 limited in scope to issues relating to mental competency
3 or really mental ability relating to somebody being
4 medically diagnosed with an IQ below a certain
5 threshold. Here we're looking at a little bit more
6 broader issues.

7 So Ms. Eckhoff, having read the filings,
8 I don't believe that's one of the allegations that's
9 been raised in your habeas corpus is that your client is
10 below the requisite IQ in order to be death penalty
11 ineligible. Is that correct?

12 MS. ECKHOFF: That's correct. But, Your
13 Honor, I would point out that US Supreme Court precedent
14 in Evitts V. Lucey makes clear that due process applies
15 in situations where, like here, the State has
16 instituted a process, right, by creating Article 11.071
17 of the court of the Texas Rules of Criminal Procedure.
18 The State has undertaken a post conviction writ process.
19 And to the extent that the State has done that, then due
20 process applies.

21 So, I don't believe that a more limited
22 reading of Panetti and Ford is actually the case. Those
23 particular cases pertain to those issues, but they are
24 guidance on the issue of due process applying in post
25 conviction, more generally.

1 THE COURT: Okay. Well, I mean, I'll take
2 that argument certainly under consideration; but I do
3 think that although the Court has discretion, in order
4 to allow the development of evidence in certain
5 categories, if warranted under the circumstances, I
6 don't know that it necessarily equates to an absolute
7 right on any potential issues. The Court's belief is
8 that each individual issue will turn on its own
9 circumstances. So...

10 And I'll rule on that, too. I think that
11 the State was accurate in that the evidentiary hearing
12 is really a matter to be developed. Evidence after the
13 fact, as necessary, but not necessarily to be used as a
14 fishing expedition or a means to -- where evidence could
15 theoretically exist, to allow it to probe every possible
16 nook and cranny.

17 My take on it has always been that if
18 there is indication of where evidence is likely to exist
19 or issues that are certainly undisputed that need to be
20 developed, that may be the appropriate avenue. But with
21 each of that being said, let's kind of dive into the
22 weeds. Specifically, we have the first issue of the
23 recanted testimony and false testimony that was alleged
24 in the briefing.

25 We have Israel Diaz -- and having not

1 presided over the actual trial itself, I'm playing a
2 little bit of catch-up with the facts. But was Mr. Diaz
3 presented as a cooperating witness on behalf of the
4 State's case in chief?

5 MS. HUTCHINS: By "cooperating witness,"
6 Judge, you mean he was himself charged with a different
7 capital murder that was reduced to an aggravated
8 robbery. He had pled guilty to the aggravated robbery
9 and it was open for sentencing after he testified in
10 Mr. Balderas' case and I believe two other cases.
11 Ultimately, he only testified in Mr. Balderas' case. He
12 did not testify in the two other cases because they
13 ended up trying different cases that didn't involve him.

14 All of this information was made known to
15 the jury, it was put out. I believe he testified in his
16 original jumpsuit from the jail and made all of that
17 information aware to the jury and was cross-examined on
18 it, as well.

19 THE COURT: Was there, whether it be an
20 written or oral understanding, I guess, between the
21 counsel for Mr. Diaz and the district attorney's office
22 that if he had provided testimony in the case or
23 presumably had agreed to provide truthful testimony in
24 the proceedings, that that would have been taken into
25 consideration in his own case?

1 MS. HUTCHINS: Judge, I don't want to
2 misspeak. There was a formal written notice given to
3 defense counsel who tried the case from State's counsel.
4 I believe it's -- it's been filed, it's in the district
5 clerk's office. I just don't have a copy of that with
6 me today. So whatever the terms were or whatever it
7 was, was disclosed to trial counsel at the time.

8 I know that the defense has asked for
9 other writings, communications within the DA's office
10 relating to information about Mr. Diaz' plea deal. That
11 was all addressed prior to my coming on the case, I
12 believe it was in 2015. And having read the transcripts
13 and correspondence, whatever existed that wasn't
14 otherwise covered by work product privilege was already
15 turned over to the Office of Capital Writs. So there
16 shouldn't be anything that remains. As far as I know,
17 there were no promises, there was nothing.

18 THE COURT: Okay. Well, in any event, at
19 some point after the conclusion of Mr. Balderas' trial I
20 understand, Ms. Eckhoff, that that witness has since
21 indicated that a portion or -- all or at least a portion
22 of his testimony was untruthful or has since been
23 recanted?

24 MS. ECKHOFF: That is correct.

25 THE COURT: And certainly, to what extent

1 has that witness made that declaration?

2 MS. ECKHOFF: In speaking with our
3 investigator, he explained what testimony of his was
4 false and -- on two different occasions. He did not
5 sign an affidavit to that effect, citing concerns raised
6 by his attorney. However, he confirmed, when presented
7 with the affidavit, that the information in that was
8 correct. So I understand, obviously, that we do not
9 have a sworn document on that; but that is exactly the
10 reason that an evidentiary hearing is necessary here, so
11 that the witness can be subpoenaed and questioned under
12 oath and we have an opportunity to ask him about that.

13 THE COURT: Well -- and this is a question
14 I have and maybe it's just more of a practical
15 consideration. Obviously, counsel who represented
16 Mr. Diaz was instructing him not to give a sworn
17 affidavit because if he had given sworn testimony during
18 the course of the trial that he is now admitting is
19 false, then he would be admitting committing perjury,
20 which in and of itself is a crime and carries punitive
21 consequences.

22 So to the effect that even if this witness
23 was produced and were put on the stand and placed under
24 oath, do you have confidence that questions that you
25 posed about whether or not he gave false testimony would

1 result in him revoking his Fifth Amendment privilege not
2 to testify?

3 MS. ECKHOFF: I cannot tell you how he
4 would testify. I don't have any insight into that, but
5 we need the opportunity to try. We need the opportunity
6 to try and present that evidence to this Court. We need
7 that in order to satisfy Mr. Balderas' right to due
8 process.

9 THE COURT: Well, any time I think you
10 have a communication that somebody has changed their
11 testimony or has recanted their testimony -- that is, of
12 all the categories, one that certainly caught my
13 attention the most. You've talked about either
14 presenting the investigator to testify, although
15 obviously, the issue you run into there is some hearsay
16 issues.

17 The most reliable way to present that
18 evidence would be through that particular witness,
19 though that witness is not willing to testify without
20 invoking the Fifth. Rather than going through that
21 process of bringing him over here just to have a
22 five-minute hearing to have him invoke the Fifth and not
23 answer any questions, I don't know if you've had any
24 conversations with his attorney to see whether or not he
25 is willing to come and testify at a hearing about those

1 matters or if he's been advised by his attorney to
2 invoke the Fifth; but certainly I think that would be
3 something that would be somewhat helpful to know whether
4 or not it would be a fruitful endeavor to even produce
5 him as a witness.

6 MS. ECKHOFF: Yes, we have not had
7 contact. And I can't say what his attorney has told
8 him. To the extent he's still even represented, I don't
9 know even know that.

10 THE COURT: Well, I think ethically, as a
11 judge presiding over a case, if there's a possibility
12 that somebody is going to testify and possibly
13 incriminate themselves in any capacity, I think,
14 ethically I'm bound to at least admonish that witness as
15 to their constitutional rights and if they're indigent
16 or incarcerated, to appoint an attorney to represent
17 their interests.

18 MS. ECKHOFF: Sure.

19 THE COURT: I think that's another issue
20 that would need to be addressed to certainly protect
21 Mr. Diaz' rights if he's going to be possibly produced
22 at a hearing. Okay.

23 Well, let's discuss Mr. Pool. I looked
24 through the briefing and I've scanned through it several
25 times. I don't know how extensive his involvement is

1 discussed, but if you could share with me specifically
2 the scope you believe that his was false. Has he also
3 recanted his testimony?

4 MS. ECKHOFF: No, Your Honor. We -- at
5 trial, he provided testimony. He testified in the
6 punishment phase. He had been a corrections officer at
7 the Harris County Jail and was called by the State to
8 testify, I believe, about a discovery in contraband, I
9 think. And, in the course of that it came out -- in the
10 course of his testimony, he recognized that he had been
11 essentially let go from the Harris County Sheriff's
12 Office due to an incident with an inmate where the
13 inmate actually died.

14 And through the -- you know, he made
15 appeals through personnel. And it was notable because
16 the issue was not only that this incident occurred and
17 the inmate ended up dying, but that part of the reason
18 that he was let go was because he was found to have been
19 dishonest about something which is, of course,
20 significant.

21 When this case came out at trial -- at the
22 trial in cross-examination, trial counsel did not have
23 his personnel file. And he said on the stand that he
24 had been cleared of all of those charges. And that
25 actually wasn't true because a review of his personnel

1 file, including what he was relying on to say he was
2 cleared of all charges, doesn't actually clear him of
3 dishonesty and doesn't clear him of this incident where
4 the inmate died; but rather, it says that he could be
5 rehired.

6 So, like, part of his punishment was that
7 he could not be rehired by Harris County Sheriff's
8 Office. And what he got, you know, cleared of was
9 actually the punishment was reduced. He wasn't cleared
10 of being dishonest.

11 THE COURT: Okay.

12 MS. ECKHOFF: And it's a misdemeanor. So
13 proof for that is the personnel record that contradicts
14 his testimony.

15 THE COURT: Well --

16 MS. ECKHOFF: So I don't necessarily
17 actually believe testimony from him in a live hearing is
18 necessary. There are records on that.

19 THE COURT: That was going to be my next
20 question, if that can be established through the records
21 developing the testimony through cross-examination
22 probably with some very fruitful --

23 MS. ECKHOFF: Correct.

24 THE COURT: Okay. Next on the issue we
25 have the matter relating to the disclosure of the

1 impeachment information relating to a witness, I think,
2 pertaining to one of the notes. Through the attorney
3 notes or investigator notes?

4 MS. HUTCHINS: They're attorney notes,
5 Judge.

6 THE COURT: Well, my understanding is --
7 what the rule requires is whether -- they opposing
8 counsel has provided the notes themselves is typically
9 irrelevant. What the courts care about is whether or
10 not the information is conveyed, whether that be
11 conveyed via email, or orally, or whatever capacity, as
12 long as it was shared with the opposing counsel prior to
13 trial at a time when it could still be useful and
14 effective.

15 So I'm reading everyone's briefing
16 correctly. It seems that the information was conveyed
17 over to opposing counsel, at least, prior to trial, but
18 it was shortly before trial. I think it was three days.
19 Is that the allegation?

20 MS. HUTCHINS: So, Judge, we have looked
21 at it in two different ways sort of based off the
22 argument that defense is making now. According to the
23 affidavit, trial counsel, Mr. Godinich, he was aware of
24 it pretrial. There's no timeline from him. He said in
25 his review of all of the documentation from the DA's

1 office, which was over a series of years that we have
2 based off of his time sheets, he reviewed the entirety
3 of the file. These notes were amongst the things that
4 he's reviewed, he was aware of them.

5 In terms of trying to pinpoint an exact
6 timeline, I think the defense makes light of this email
7 that existed at least we know three days before
8 testimony started. At minimum, we know three days
9 before they were made aware of some meetings that
10 occurred and that's sort of, in terms of a timeline, the
11 best we can qualify. But Mr. Godinich says he was aware
12 of it well before. Prior prosecutors on the case say
13 that these notes were available in the State's file for
14 defense to review. The defense did review the State's
15 file and that was back in 2010, 2011.

16 And one thing I did want to mention to the
17 Court that we didn't include in our briefing, I came
18 across it again in preparing for this hearing, is that
19 Mr. Godinich actually in presenting Walter Benitez, I
20 believe, one of his -- his star defense witness,
21 Mr. Benitez actually testifies to some of the contents
22 of these notes and the meetings that were held several
23 days before the murder talking about what was discussed
24 at the murder and the hit being put out.

25 So I just wanted to bring that to the

1 Court's attention that they were able to make use of
2 that evidence, even if it was three days; but we
3 certainly believe it was years before.

4 MS. ECKHOFF: There's a few different
5 points I would like to address here. First of all, I
6 think the State misunderstands the significance of the
7 pretrial hearing, at least the significance to us.
8 Okay.

9 These notes that were withheld were
10 impeachment because on multiple occasions years before
11 the trial, the State's star witness against Mr. Balderas
12 gave contradictory statements. What he says in those
13 happened is not what he testified to. They're prior
14 inconsistent statements. Right? That was not revealed
15 three days before at this pretrial hearing. Right?
16 This is not what that pretrial hearing disclosed.

17 I raised that because in Mr. Godinich's
18 and Mr. Nunnery's affidavits, they make the assertion
19 that they knew about all of these things and
20 incorporated them. And what I'm telling you is that in
21 viewing trial counsel's own emails amongst the defense
22 team, it makes clear that they were unaware of these
23 meetings until three days before.

24 I fully acknowledge that they have notice
25 of that three days before, or whatever, at this pretrial

1 hearing. However, those meetings were discussed in the
2 notes. Diaz had provided that information to the State.
3 So, for State -- or for the trial counsel to be like,
4 Hey, I'm surprised to find out that this is the State's
5 theory of what happened, you know, just a few days
6 before trial, calls into question their assertion that
7 they viewed these notes before and incorporated them
8 into their preparations.

9 And further, I will also note that
10 Mr. Godinich doesn't actually say that he saw the notes.
11 His affidavit says the notes were viewed. It doesn't
12 say who viewed them or when they were viewed. And they
13 also, both trial counsel -- and Mr. Nunnery's statements
14 is even more vague. It's, I was aware that the notes
15 existed.

16 Doesn't say how or anything to give you
17 any more information than that. So I think that that
18 vagueness is a real issue. And there's a case here of
19 Harris County, ex parte Prevost where the CCA has
20 remanded on one of these writs because trial counsel's
21 affidavits were vague.

22 The other issue is in their affidavits
23 they both say that they incorporated the knowledge that
24 they gained from reviewing these notes into their
25 cross-examination of Mr. Diaz. Again, these notes

1 pertain to prior inconsistent statements that Mr. Diaz'
2 had made to the State. There are no questions on
3 cross-examination of Mr. Diaz at trial about prior
4 inconsistent statements or even prior meetings with the
5 State. So, that doesn't seem to match up with what
6 trial counsel is asserting in their affidavits.

7 And I think what we need here is the
8 opportunity to cross-examine. You know, the Supreme
9 Court says that reliability in proceedings like this is
10 best determined through the crucible of
11 cross-examination. We need to be able to ask these
12 questions and get past the vague answers and know what
13 we're actually dealing with here. And that's really all
14 we're asking for is an opportunity to confront witnesses
15 against Mr. Balderas and present evidence because we
16 haven't had that opportunity yet.

17 THE COURT: The issue that, as far as the
18 disclosure goes, in the defense counsel's affidavit they
19 stated, at least from the record it was clear, that in
20 the hearing it was laid out or made known, the
21 inconsistent statements.

22 MS. ECKHOFF: No, they said -- my
23 understanding is that the hearing was where the State
24 went in and said, This is what our theory of the case
25 is.

1 They didn't say, This is our theory of the
2 case. We are going to rely on Mr. Diaz to do it. And
3 oh, by the way, he said contradictory things to us
4 before.

5 The inconsistent statements were not an
6 issue at the previous trial hearing.

7 MS. HUTCHINS: Judge, if I may respond?

8 THE COURT: You may.

9 MS. HUTCHINS: I think we have, I guess,
10 two different frame works that we're are looking at if
11 I'm understanding correctly. So at the pretrial hearing
12 that happened, the State proffered what they were going
13 to prove through various witnesses. And one of the
14 things that they proffered was that they were going to
15 provide testimony, that there was a meeting three days
16 before the murder. And at that meeting there was a hit
17 put out on the complainant, the defendant was present at
18 that meeting; and it was just made known that that's --
19 that the hit was out.

20 When Mr. Godinich returns to the office,
21 I'm assuming, is when he writes this email. And he
22 writes the email to the defense team that says, We
23 learned some information. We learned the State's
24 case -- a part of their theory of their case and it's
25 the first time that we've heard about meetings three

1 days before and three days after the meeting.

2 I've reviewed the transcript from the
3 hearing. There was never any mention of the meeting
4 three days after. I believe Mr. Godinich made an error
5 in that regard in writing that front portion of the
6 email. And so -- and he asked the defense team for any
7 insight into this.

8 Well, when you -- and so that's the extent
9 of sort of, at least on the transcript, what was
10 revealed from the meetings that were held three days
11 before. There is a portion in the transcript where
12 Mr. Nunnery specifically asked, I believe twice, "Three
13 days before? Three days before?" Which in reviewing
14 it -- again, we are reviewing paper documents -- it
15 becomes of note because looking at the Diaz notes, the
16 Diaz notes do mention meetings. And they mention
17 meetings nine to ten months before. And they mention
18 meanings that appear to be different with no timeline,
19 but there's never specifically a three-day meeting
20 that's mentioned in the notes.

21 So that's the point that I was trying to
22 make in my written motion was that this element of
23 surprise that appears in Mr. Godinich's email is not
24 mutually exclusive from him, his having prior reviewed
25 the contents of the notes or somebody having told him

1 the notes or whatnot because that three-day number never
2 exists in the notes. In terms of the entirety of notes,
3 the entirety of the notes deal with three different
4 conversations that were had with Mr. Diaz and the
5 State's attorneys back in, I believe it was, 2007 and
6 2008.

7 And these conversations deal with a host
8 of different extraneous offenses. They jump around, the
9 names are sort of confusing as to who's participating in
10 what, what's happening where. And those are the
11 notes -- the rest of the contents of the notes are what
12 Mr. Godinich and Mr. Nunnery say they were aware of the
13 information in that note -- in those notes before trial.

14 I know defense counsel is now making a
15 distinction, Well, if they knew it, they certainly
16 didn't use it at trial. Well, that's trial strategy.
17 That's how they want to conduct their cross-examination.
18 Just because they didn't specifically cross-examine on a
19 point that Mr. Balderas now wishes they had doesn't mean
20 that they were ineffective and doesn't mean that they
21 didn't know about it, and I think that's the key issue
22 here.

23 MS. ECKHOFF: I think there's two points
24 to make to that. One is you're presuming a lot. The
25 State is presuming a lot about what Mr. Godinich's email

1 meant. This is something we should ask him, he should
2 be providing those answers. We shouldn't be basing it
3 on what the State is interpreting.

4 Second of all, and to a similar point is
5 that the State -- trial counsel may or may not have a
6 strategy. Those are things that they can testify to
7 themselves that they should be cross-examined on. It's
8 very easy in a post-conviction case for trial counsel to
9 come in and say any error was due to strategy. And
10 that's clearly not always the case because if that was
11 the case, we wouldn't have post-conviction relief. And
12 they need to be tested on what that strategy was and
13 what the thinking was and we need to be able to prove
14 whether it was or was not strategy.

15 We don't -- we should not just take their
16 assertion, or in this case the State's assertion that it
17 must have been strategy. That's just not how these
18 proceedings should work. We need the right to confront
19 these witnesses.

20 MS. HUTCHINS: Just one more thing, if I
21 may?

22 THE COURT: Please.

23 MS. HUTCHINS: Separate from this, I just
24 want to move it along. One of the cases that Counsel
25 referenced was Prevost saying that that case was out of

1 Harris County, which it was, and that it was sent back
2 because the affidavits were so vague. The affidavits in
3 Prevost were much different than the ones that were
4 filed here. And in that particular case, they were
5 sent back for additional affidavits to clarify some of
6 the points that were made, which is also certainly
7 something this Court is able to do.

8 THE COURT: I understand. And that's
9 something I've noted, as well. Ultimately, as I
10 understand it, the attorney affidavit referenced that
11 they had access to the notes and the notes were viewed
12 by somebody on the defense counsel team -- it doesn't
13 necessarily state who -- that ultimately at the time the
14 affidavits were drafted, the defense counsel was aware
15 of, I guess, the contentions of these inconsistent
16 statements and had not indicated in their affidavits, at
17 least that I saw from review of the affidavits, that
18 there was information that they were not privy to or did
19 not have access to, just from our review of the
20 affidavits. That's certainly an aspect that I will take
21 under consideration.

22 Next, let's address the matter of
23 ineffective assistance of counsel. Now, I know there
24 are at least four different caveats you've raised in
25 your petition that address ineffective assistance of

1 counsel on trial counsel and right of capacities.

2 And so first, I'll note that as a basic
3 premise under Strickland the Courts have always
4 addressed this that ineffective assistance of counsel
5 that would amount to representation that was so
6 deficient that essentially the defendant did not have an
7 attorney assisting in the trial.

8 MS. ECKHOFF: No. Your Honor, it's
9 whether or not errors were made that would cause
10 prejudice. And the prejudice is whether or not even one
11 juror would have changed their mind.

12 THE COURT: Okay. Well -- so let's kind
13 of probe these individually. And again, I note -- I say
14 that noting certainly, as you noted, with any trial
15 strategy that, you know, hindsight is always 20/20.
16 Sometimes an attorney can, you know, roll the dice
17 thinking that outcome may have one result and have a
18 different result. And in my experience, having
19 previously dealt with dozens and dozens of 22.55s and
20 doing the issues of ineffective assistance of counsel
21 this is an area that I have some experience. So we'll
22 just tackle these individually.

23 We're talking about the first issue, I
24 think, you've raised in the guilt-innocence phase to
25 address, investigate or present information on alibi

1 evidence. Essentially, I guess, you're alleging that
2 counsel didn't do enough information to investigate the
3 case prior to it being tried?

4 MS. ECKHOFF: Correct, their investigation
5 was inadequate.

6 THE COURT: Okay. And specifically, in
7 what regards?

8 MS. ECKHOFF: First of all, we know that
9 these witnesses exist. We've provided affidavits from
10 them. And the only point at which a trial counsel in a
11 capital case should not be investigating is if they have
12 a reasonable basis for not investigating. Right? And
13 there's no indication here that there was no -- there
14 was a reasonable basis for failing to investigate the
15 guilt phase aspects of this case.

16 Clearly the guilt phase, the State's case
17 against Mr. Balderas was anything but open-and-shut. I
18 mean, we have a jury that had to deliberate for more
19 than two days before, you know, finding him guilty and
20 only after, as you've already mentioned, the extraneous
21 influences on them did they come to a guilty verdict,
22 you know. And there are still serious questions about
23 whether or not Mr. Balderas committed this crime.

24 And the guilt phase could have -- trial
25 counsel could have presented, could have discovered and

1 presented alibis. And there's no indication that they
2 actually sought to investigate, talked to people.

3 I mean, if you read their affidavits they
4 make very clear that they blame any lack of
5 investigation on their part on Mr. Balderas himself, or
6 on his family and friends. And Rompilla v. Beard makes
7 very clear that that is no excuse for not investigating
8 the case.

9 THE COURT: Well, let me pose this
10 question to you: Rather than asking defense counsel to
11 come and question them about the failure to investigate
12 certain factual matters that you think would pertain to
13 guilt/innocence, why not just present evidence on those
14 particulars that you've addressed at a evidentiary
15 hearing? In other words, if you believe that there is
16 additional evidence that exists that was not reflected
17 in the record that would pertain or reflect on actual
18 innocence, why not petition the Court to bring in
19 witnesses to develop that evidence at the habeas corpus
20 level?

21 MS. ECKHOFF: That is a part of what we
22 would present at a live evidentiary hearing because it's
23 important to note that this Court is going to have to
24 make credibility determinations about witnesses. We
25 have provided affidavits from these witnesses in order

1 to support -- to meet our pleading burden in filing the
2 application.

3 And I want to make clear that -- and even
4 the State notes this in their brief -- that we are not
5 required to plead evidence with our application. We are
6 only required to allege the facts which, if proven true,
7 might result in relief. And we have met that burden
8 here and we do that by attaching affidavits. We have
9 those affidavits, we want to call those witnesses, and
10 we want you to hear them testify so you can assess
11 credibility.

12 THE COURT: And that kind of relates to my
13 original question. My main goal and my main focus that
14 certainly gets my attention is the issue of wrongful
15 convictions. And if there's evidence that was not
16 presented or was even unknown at the time that could
17 weigh on a person's conviction that would indicate that
18 the wrong -- an innocent person has been convicted of
19 this crime, or the wrong person has been convicted that
20 it comes up after the fact or is newly discovered, then
21 that a -- at any time post trial, and certainly in the
22 habeas corpus setting, that that would be an appropriate
23 time to do that.

24 So what evidence is it that you believe
25 exists that was not properly developed that needs to be

1 developed at this point? What witnesses, specifically
2 by name, do you need to call in order to develop that
3 testimony?

4 MS. ECKHOFF: The specific witnesses that
5 we've attached affidavits from are Anali Garcia --

6 THE COURT: Any witnesses that you believe
7 exists that would offer testimony that would bear on the
8 innocence of your clients.

9 MS. ECKHOFF: Right. So we have at least
10 two witnesses, Anali Garcia and -- I apologize, Octavio
11 Cortes.

12 THE COURT: And Ms. Garcia, what is her
13 relevance or relation to this case?

14 MS. ECKHOFF: She is an alibi witness.

15 THE COURT: Okay. And her testimony was
16 not presented during the original trial?

17 MS. ECKHOFF: No.

18 THE COURT: Okay. And then Ms. Cortes,
19 what is her relevance in this case?

20 MS. ECKHOFF: It's Octavio, it's a mister.

21 THE COURT: Sorry, Mr. Cortes.

22 MS. ECKHOFF: Actually, it's Ms. Garcia's
23 brother. Also an alibi witness.

24 THE COURT: Are those witnesses located
25 within the subpoena power of this court or are they

1 located in Mexico or any other location that's outside
2 of the subpoena power?

3 MS. ECKHOFF: I believe at least
4 Ms. Garcia is in Texas. And Mr. Cortes, the last that
5 we spoke to him, was within the United States. I'm not
6 sure his current location.

7 MS. HUTCHINS: May I be heard?

8 THE COURT: Ms. Hutchins, let me hear from
9 you on that aspect. Obviously, I guess the contention
10 is that the original trial counsel were aware of these
11 witnesses elected not to present their testimony at
12 trial for whatever, whether it be strategy or whether or
13 not they found that witness to be credible.

14 MS. HUTCHINS: Correct, Judge.
15 Mr. Godinich specifically identifies Ms. Garcia in his
16 affidavit and has notes from meetings with Ms. Garcia;
17 likewise, met with Iliana Cortes, who is also a sister.
18 Mr. Octavio Cortes, my understanding is, is the brother.
19 This is a family with whom the defendant's brother has a
20 child with one of the sisters. I can't remember if it's
21 Iliana or Anali. So in essence, it would be, like, his
22 in-laws.

23 The defense was aware of Ms. Garcia and
24 Ms. Cortes, met with them, specifically spoke with them
25 about the alibi defense which would be that Mr. Balderas

1 was at the house making illegal copies of CDs at the
2 time and wasn't allowed to leave when news broke out of
3 the murder. But during these meetings these witnesses
4 had very vague recollections, couldn't provide any
5 recollections, no specifics, were told that they had to
6 go meet with the defense attorney by Mr. Balderas'
7 girlfriend so they showed up not really knowing why they
8 were there.

9 And ultimately, defense counsel made the
10 decision that they did not have any either useful or
11 admissible evidence that they can present at trial and
12 chose not to. And I believe there's documentation
13 attached to Mr. Godinich's affidavit, as well as some of
14 the exhibits the defense has attached to their own writ
15 application that support this.

16 THE COURT: Okay.

17 MS. ECKHOFF: That's not entirely correct
18 because while Ms. Cortes, I do believe, was taken to
19 meet with defense counsel, Ms. Garcia did not meet with
20 defense counsel in person. In fact, she called them up
21 on her own to reach out to them. They never reached out
22 to her. And they didn't discuss, like trial counsel --
23 there's no indication that they discussed any aspect of
24 an alibi with her, they were asking her more about
25 mitigation issues of you know, What's your relationship

1 like with Mr. Balderas? And is he a nice guy, type
2 thing. They didn't broach the alibi with her. They
3 never discussed it with her.

4 THE COURT: Well, outside of these
5 particular witnesses, are there any other areas that you
6 felt that the trial attorneys failed to adequately
7 investigate which you believe or note that evidence
8 exists that needs to be established on the record?

9 MS. ECKHOFF: And to be clear, Your Honor,
10 there may be additional witnesses, additional alibi
11 witnesses beyond what we have attached. Right? There
12 were other members of the family, et cetera. However,
13 those are the affiants that we documented to meet our
14 burden.

15 Beyond that, trial counsel also didn't
16 conduct an investigation into the actual gang.
17 Obviously, this was a gang shooting. And to better
18 understand the structure of the gang and how it operated
19 in order to confront the State's depiction of how the
20 gang worked and, you know, the State said that
21 Mr. Balderas had to be the shooter for one reason or
22 another because of, like, essentially gang politics.
23 And there are witnesses who can provide insight, who
24 provided insight to support our application on how the
25 gang actually operated.

1 And had they done that, then they could
2 have actually confronted the State's depiction of how
3 this all went down. And if that were the case, they
4 could have poked holes and challenged what they were
5 telling the jury.

6 THE COURT: And who were those particular
7 witnesses that would have testified on those particular
8 matters?

9 MS. ECKHOFF: In particular, Jose Perez
10 and Walter Benitez. Now, Walter Benitez did testify as
11 a defense witness at trial; but there was more that he
12 could have provided which is detailed in the affidavit
13 attached to the application.

14 THE COURT: Okay. And Mr. Perez'
15 testimony would have been, I'm guessing, in line of what
16 Mr. Benitez would have testified to?

17 MS. ECKHOFF: Correct.

18 THE COURT: Any other areas that you feel
19 were not properly investigated but factually needed to
20 be established on the record or that would establish
21 their actual innocence or wrongful conviction?

22 MS. ECKHOFF: And to an extent, the
23 eyewitness identification, which is a different part but
24 sort of a related piece of the ineffective assistance of
25 counsel guilt claim which is that, you know, aside from

1 Mr. Diaz, the State's other key witness against
2 Mr. Balderas was an eyewitness who is testifying, you
3 know, more than nine years after the fact about her
4 memory of that night.

5 And the line-up procedures that she was
6 put through before making the identification were
7 suggestive and problematic. And her identification in
8 the first place was a problematic because initially she
9 says immediately after the fact, you know, her first
10 recollection in speaking with law enforcement is, I've
11 never seen this guy before. I didn't know who he was.

12 And then it's only more than a week later,
13 after viewing a lineup with Mr. Balderas' picture in it
14 the day before, she says, Oh, yes. That's him.

15 And that's significant because she knew
16 Mr. Balderas for up to a year before this incident
17 occurred. So, that's questionable in the first place.
18 So trial counsel investigated this eyewitness
19 identification and the circumstances surrounding it, and
20 investigated the eyewitness herself. There is evidence
21 out there that the eyewitness, Ms. Bardales, had had a
22 relationship with Mr. Diaz, who the State had also
23 brought to her a lineup with his picture in it before
24 this.

25 And she was, like, Oh, yes, I know him.

1 And she had had a prior relationship with him. And I
2 think that that is -- if these facts had been presented,
3 I think that that could have been important because I
4 think something else that's really key to this -- it's a
5 complicated case -- is that Mr. Diaz' had a motive to
6 kill this victim.

7 This victim was going to be a witness
8 against him in an aggravated robbery case. He had the
9 motive to kill, not Mr. Balderas. And if you combine
10 that with, you know, the eyewitness' prior relationship
11 with Mr. Diaz that can cast further doubt on her already
12 shaky identification.

13 And then, of course, that leads into the
14 issue of the eyewitness identification expert and how
15 that happened. And I'm happy to go into that now or we
16 can address this first and get there.

17 THE COURT: I don't think we need to dive
18 into the full fleshed-out matters of that. Again, I've
19 read the transcripts in the prior hearing; but if I
20 understand it correctly, the issue is that there was
21 identification, an eyewitness expert that was detained
22 or noticed by the defense to be used but ultimately not
23 called?

24 MS. ECKHOFF: Correct. He gave testimony
25 outside the presence of the jury because trial counsel

1 attempted to get the identification thrown out. The
2 Judge ruled that the identification was coming in, but
3 the trial counsel could present this expert to the jury.
4 This expert who provided information about, you know,
5 why the lineup procedures were suggestive and how that
6 may have impacted an identification. And trial counsel
7 just never presented this information for the jury.

8 MS. HUTCHINS: Judge, might I be heard?

9 THE COURT: Briefly, yes.

10 MS. HUTCHINS: Judge, in terms of that
11 there, in fact, was a hearing on the record with
12 Dr. Malpass, the ID expert. And after his testimony to
13 the Court and then after another defense witness,
14 Celeste Munoz testified again in another hearing outside
15 of the presence of the jury, the defense brought up with
16 the Court their concern about a particular case that
17 they had found. And they cite that in the record. It's
18 in Volume 29, Page 14.

19 And they specifically tell the Court that
20 in light of what they found and in this case they are
21 worried that it's -- that by presenting Dr. Malpass,
22 they are going to open the door. And the Court
23 specifically says, you know, I'm not familiar with that
24 case. I don't think it's going to open the door, but
25 again, I'm not familiar with that case.

1 And she's also said she's not familiar
2 with all of the different extraneous that exist. And
3 so I think it's clear at that point that the defense had
4 this excerpt, they put on the testimony for the Court,
5 they've heard how the testimony of Ms. Munoz is going to
6 go, as well as Dr. Malpass. They have this case law and
7 amongst themselves at that point made a reasonable
8 decision that they know the case better than the judge
9 and chose not to present this witness.

10 THE COURT: Ultimately, the testimony of
11 the witness was, at least, established on the record,
12 although it would be outside the presence of the jury,
13 the evidence was at least recorded on the record for
14 review. Correct?

15 MS. ECKHOFF: It's essentially, yeah, a
16 proffer.

17 THE COURT: Okay.

18 MS. ECKHOFF: And just to be clear, the
19 Court's ruling on two different occasions in this case,
20 you know, both when Dr. Malpass was present and when
21 she's speaking about when Ms. Munoz was at issue, the
22 Court's ruling was that Dr. Malpass could testify
23 without opening the door about suggestive lineup
24 procedures.

25 THE COURT: Okay. I think that kind of

1 covers the issue of evidence that was not presented
2 unless, Ms. Eckhoff, is there anything else that we have
3 not addressed that we need to cover on the issue of
4 trial counsel's failure to present certain evidence that
5 you believe related to guilt or innocence?

6 MS. ECKHOFF: No, I believe that's it.

7 THE COURT: Okay. I note there the next
8 point where you've got trial counsel's failure to
9 present certain testimony of witnesses from Mexico. And
10 my recollection from the transcripts and from the record
11 was that there had been attempts to obtain those
12 witnesses. Again, they're outside the subpoena power of
13 the Court, but they voluntarily appeared electronically
14 through Skype or some sort of other teleconference
15 network but because of technical difficulties, some of
16 the testimony was cut short. And then another witness
17 refused to testify or was unable to because of technical
18 difficulties?

19 MS. ECKHOFF: That's my understanding in
20 terms of how the actual Skype testimony went was that
21 once -- as it was being presented, there were technical
22 difficulties, I believe, on this side of things that was
23 making it incredibly difficult and it was sort of
24 abandoned.

25 And the claim is actually that trial

1 counsel didn't preserve for the record the trial Court's
2 denial of the funds. So there are some indications in
3 emails between trial counsel and the judge that he was
4 trying to get funds in order to bring these witnesses in
5 physically from Mexico to testify. And the Court
6 informs him that she's basically not going to do that
7 and to come up with some other way of doing it. And, of
8 course, eventually at the trial it doesn't work very
9 well and it all gets abandoned.

10 Because trial counsel never made that
11 request on the record and it was never denied on the
12 record, it was not an issue that could be addressed on
13 appeal. So the claim is that they were ineffective for
14 failing to preserve the denial of funds on the record.

15 THE COURT: Okay. Well -- and again, at
16 least as to the request for denial of funds, as far as
17 questioning defense counsel, it seems like that's
18 something that's not so refuted. The record will speak
19 for itself whether or not they raised an objection or
20 not. But as far as the affidavit goes, you're not
21 contending that there's any ambiguity in their responses
22 to that allegation?

23 MS. ECKHOFF: They're -- if I recall
24 correctly, I don't believe their affidavit addresses
25 their failure to make that request on the record at all.

1 THE COURT: Next we've got the trial
2 counsel's purported failure to allege the right to a
3 speedy trial. I do note that there's, I think, eight
4 years between that had passed between the date of the
5 alleged offense and then the date of trial, which is a
6 significant amount of time. Albeit, in a capital case,
7 it's not out of the ordinary to have a considerable
8 amount of time to pass, especially for defense counsel
9 to be -- have time to prepare for trial.

10 My experience, usually time is usually an
11 ally of the defense. So it's fairly seldom that I see
12 defense counsel wanting to go to trial rather quickly.
13 But on looking at the issue of prejudice, is there a
14 particular piece of evidence or a particular way that
15 you feel your client was prejudiced by not going to
16 trial sooner versus the date that the trial actually
17 commenced?

18 MS. ECKHOFF: Well, Your Honor, there was
19 a key mitigation witness who died during that time,
20 Mr. Balderas' brother. And because this case, you
21 know -- because this case involved such weak evidence
22 against Mr. Balderas in the first instance, it all
23 basically comes down to one eyewitness who has a shaky
24 identification and a codefendant who literally flips a
25 day before Mr. Balderas' trial begins, that

1 recollections -- I mean, we have an entire claim that
2 there was this alibi. Right?

3 If they had investigated and discovered
4 this alibi, like, those memories of the night eight
5 years ago would arguably be much stronger closer in
6 time. I think that all of that -- and I take your point
7 that I'm sure that it is the case that the defense would
8 usually want to wait longer to go trial, but I think
9 that that presumes that there's actually an active
10 adequate investigation happening.

11 There are long, long periods in that eight
12 years where it's wholly unclear whether any significant
13 investigation, particularly into the guilt phase of this
14 case, was ever occurring.

15 THE COURT: Okay. And then finally,
16 alleged ineffective assistance of counsel as to the jury
17 selection process talking about the topic of sexual
18 abuse during voir dire. In what capacity was that
19 particularly an issue in this case?

20 MS. ECKHOFF: Mr. Balderas himself. A key
21 piece of the mitigation that trial counsel presented at
22 trial was his own history of sexual abuse. And it was
23 definitely a key component of the mitigation that they
24 presented in his defense. And despite knowing that well
25 in advance of conducting voir dire, they didn't ask any

1 questions of potential jurors that might kind of sauce
2 out their own experiences with sexual abuse or their
3 understanding of it, those sorts of things that could
4 help them identify whether that would be a juror where
5 evidence of this type might resonate.

6 THE COURT: Well, so what was -- was the
7 issue to try and identify jurors that had been victims
8 of sexual abuse?

9 MS. ECKHOFF: It's -- no, not necessarily.
10 It's to their views, and their understanding and how
11 they might receive that evidence.

12 THE COURT: I mean, I know with voir dire
13 it's kind of not an exact art on what things you may
14 want to raise with a jury or may not want to raise with
15 a jury. Certainly, logical things that would relate in
16 a capital case would be issues relating to the death
17 penalty, issues relating to prior criminal convictions,
18 criminal history, people's belief on whether someone
19 could be rehabilitated.

20 All those things certainly would be very,
21 very relevant; although, I think that would clearly fall
22 squarely within the issue of trial strategy of someone
23 not wanting to raise the issue of sexual abuse with a
24 jury in that it could also be a double-edged sword. You
25 have people that have very strong feelings relating to

1 that topic. That may also result in jurors being -- I
2 guess, having the fans flamed on somebody they'd be more
3 inclined to convict versus one they'd be more inclined
4 to find at issue with mitigation and possibly having to
5 qualify the jurors before they've even decided guilt or
6 innocence is a bit of a challenge. But that issue, I
7 think, may be a little bit tougher issue.

8 I think generally in voir dire, appellate
9 courts have given lawyers a little bit more leeway in
10 strategy in qualifying jurors. But other than raising
11 the issue of -- the defendant's issue of people's
12 experience of sexual abuse or their own attitudes
13 towards it, or any other areas within the voir dire
14 process of the trial, you felt that the trial counsel is
15 deficient and would warrant needing to be presented as a
16 witness to be examined further at an evidentiary
17 hearing?

18 MS. ECKHOFF: I don't believe so.

19 THE COURT: We've gone about an hour and
20 my customary practice is about every hour to take about
21 at least a 10-minute break to let everybody use the
22 restroom and, more importantly, to let our court
23 reporter get a brief of rest of the hands. So why don't
24 we do that, take a 10-minute recess and then we resume
25 at 35 minutes past the hour.

1 *(Recess taken.)*

2 THE COURT: All right. We're back on the
3 record. I think we're getting towards the tail end of
4 the issues that we needed to address.

5 Ms. Eckhoff, next on my list was the issue
6 pertaining to the jury's exposure to certain outside
7 influences. And I know we'll address each of those
8 individually, but I just want to make sure that I'm
9 clear. Are you asking the Court to bring in individual
10 jurors from that trial and question them pertaining to
11 their deliberations and those influences?

12 MS. ECKHOFF: No, I don't think it's
13 necessary to question them about their deliberations.
14 And I understand that that's not even permissible under
15 606(b).

16 THE COURT: Correct.

17 MS. ECKHOFF: What I do think is important
18 is to hear how they interpreted these events. It's
19 impossible, I think, to assess whether these were
20 extraneous influences that could affect a juror. And I
21 think this is why, as we somewhat discussed at the prior
22 hearing, you know, this isn't about these specific
23 jurors and their specific decision and whether they can
24 say that this affected their decision or not.

25 The standard -- the law makes clear that

1 the question is whether or not these events would
2 basically have impacted a hypothetical juror in their
3 position. Right? I think it's important to -- well,
4 because it can't be them, specifically. It's someone
5 sitting in a situation like them. Is it possible or
6 likely that someone experiencing that would be affected
7 and have it affect their verdict?

8 What is important to hear from the jurors
9 is what they saw, how they -- what the reaction was and
10 how that felt and how it impacted them. And then you
11 can take that information to understand, okay, if
12 someone -- a hypothetical juror was feeling that, could
13 it have impacted their verdict.

14 And I think another key piece of this
15 claim is the timing of when the Court addressed this on
16 the record. That's another key piece of this claim.
17 And it's really unclear, even from all of the
18 information that has been presented in the application
19 and in the State's response to it, we still don't have
20 a clear timeline of when the Court became aware that
21 this had happened. And that's really important because
22 we have indication -- we provided an affidavit from a
23 person who was sitting in the courtroom that day, a
24 member of Mr. Balderas' family who says that the Court
25 was informed that this had occurred before the verdict

1 came back at the guilt phase.

2 And if that's the case -- and yet it
3 wasn't actually addressed on the record or acknowledged
4 until after the verdict came in and after everybody took
5 a lunch break -- that violates his rights to due
6 process. That is something that should have been
7 addressed on the record before the verdict came in. The
8 impact that that had on the jury should have been
9 assessed prior to their verdict.

10 THE COURT: And I want to make sure that
11 I'm clear on this. You're not making any contention
12 that there was any juror misconduct by a member of the
13 jury, that they had engaged in any impermissible
14 investigation or disregarded any of the Court's
15 instructions not to investigate any factual matters on
16 their own outside of the evidence presented in court?

17 MS. ECKHOFF: Well, we have the extraneous
18 influence portion of this claim and then there are
19 specific claims of juror misconduct. For example, there
20 was a juror who, in violation of the court's orders, was
21 posting about his experience sitting on the jury on
22 Facebook and had responses from his Facebook friends,
23 you know, saying, you know -- yes, Give him the chair.

24 But with regards to these extraneous
25 influences, no. There's no allegation that the jurors

1 have gone beyond, these were things that happened to
2 them.

3 THE COURT: And I've read the affidavits
4 of several of those jurors that were attached as
5 exhibits. And I do note that those affidavits tend to
6 be very detailed and descriptive. They generally tend
7 to be consistent with the issues of the location of the
8 hotel, and that several of the jurors were aware that
9 the location of the crime scene was a relatively short
10 distance from the location of the hotel. But I didn't
11 see anything in the affidavits that indicated that
12 jurors actually went to the location of the crime scene
13 or were transported by the crime scene to and from their
14 transportation from the hotel by the court during
15 sequestration.

16 MS. ECKHOFF: I think that that's correct
17 as far as I know, as well; but I think what's something
18 to keep in mind and what they noted, right, is they had
19 just sat through days of testimony about this gang and
20 where in southwest Houston it operated. And they were
21 hearing names of streets and all of this and then
22 they're passing all of these streets on their way.

23 So they know that they're being taken
24 closer and closer and being asked to stay very close to
25 where this happened within the area where the gang at

1 issue in this had operated. I think that is more than,
2 you know, seeing the crime scene itself. It's how
3 that -- how that concerned them.

4 THE COURT: Well, the concerns they had,
5 though, I mean, are those concerns not reflected in the
6 affidavits that have been tendered as exhibits?

7 MS. ECKHOFF: No, I believe that they are
8 reflected in their affidavits.

9 THE COURT: Okay. So as far as presenting
10 testimony at an evidentiary hearing, it would seem to
11 me, though, the concerns that were raised were pretty
12 well documented in their affidavits. As far as needing
13 to bring a juror into court and place him under oath and
14 ask him questions about that, it seems, though, their
15 concerns relating to the location of that hotel were
16 pretty well documented.

17 The other issue is the concerns about
18 Mr. Balderas' brother purportedly waving at the bus.
19 And I'll note it doesn't seem that he was ever located
20 by the bailiffs or whether it was every actually
21 confirmed if it was, in fact, Mr. Balderas' brother.
22 But there was a person waving that was believed to have
23 been a relative, which also was documented in the
24 affidavit, as well.

25 I'll note that the concern being, as

1 reflected by the jurors, was that some of them felt
2 somewhat frightened or that their safety was not being
3 appropriately addressed. But wouldn't you agree that if
4 the jurors are generally feeling as though in a capital
5 case involving a gang in the Houston area, that
6 generally speaking the juror issues pertaining to juror
7 intimidation have historically been towards jurors being
8 reluctant to convict because they were intimidated or
9 were afraid of consequences versus convicting because
10 them felt intimidated?

11 I mean, generally speaking, if a juror is
12 saying that they felt threatened or intimidated, usually
13 they were reluctant to convict because they're afraid of
14 repercussions coming from convicting a gang member.

15 MS. ECKHOFF: I would -- in all honesty,
16 Your Honor, this is actually the only case that I've had
17 where this has been an issue. And while I see your
18 point, I could just as easily see a juror deciding that
19 they want to punish him more because they're scared and
20 felt like -- that someone associated with them trying to
21 intimidate them. I can't presume to know how a juror is
22 going to go one way or the other.

23 THE COURT: I say that -- my background
24 traditionally has been in federal courts dealing with
25 large-scale drug trafficking cases involving the Gulf

1 cartel or the zeta that cartel where obviously there
2 were multiple instances of cartel members or gang
3 members attempting to influence either witnesses, or
4 jurors, or other ways in order to affect the outcome of
5 the case.

6 And so that's something that obviously
7 exists and is recognized in jurisprudence. It may be
8 more recognized at the federal level; but, I mean, just
9 as a practical matter of speaking one of the things that
10 jumped out at me was that if jurors felt, I guess,
11 intimidated, just logically thinking at it, wouldn't it
12 seem to be more inclined to curry to the defendant's
13 favor versus -- versus not necessarily being more
14 inclined for conviction?

15 I didn't see anybody -- anywhere in the
16 affidavits that one of the jurors indicated that they
17 were more inclined to convict because they were either
18 angry, or upset, or were aggravated because of that
19 occurrence.

20 MS. ECKHOFF: Well -- and Your Honor, I
21 would point out that that is exactly -- I believe would
22 fall under 606(b). Right? That's actually -- that
23 would be evidence of their own deliberations. And
24 that's why it isn't in their affidavit. It's not
25 admissible evidence, but I think --

1 THE COURT: Let me rephrase it. It didn't
2 seem as though the jurors indicated that they had taken
3 a hostile approach. It seems that generally the tone of
4 the affidavits were that the jurors were afraid and
5 concerned because of it, because they felt that there
6 were lapses in security and there should have been more
7 higher level of scrutiny or security that should have
8 been given to their safety by the court system and by
9 the bailiffs that were assigned to them.

10 MS. ECKHOFF: I think that's certainly a
11 key, a piece of how they felt; but I mean, they are
12 seeing this person that they understand to be a relative
13 of Mr. Balderas and they're interpreting him as trying
14 to intimidate them and create these feelings of fear.
15 There isn't -- I don't know of any evidence at this
16 point in the record one way or the other, honestly,
17 about either being more or less likely to convict based
18 on that experience. But that is clearly an experience
19 that could impact their verdict.

20 THE COURT: Okay. And then finally I have
21 what I've labeled as the kind of constitutional issues.
22 I think we can move through many of these rather quickly
23 because I don't think they're necessarily going to
24 warrant any calling of any live testimony or develop
25 anything from an evidentiary standpoint.

1 MS. ECKHOFF: Correct, they're questions
2 of law.

3 THE COURT: But I did want to cover them
4 very quickly just to make sure that I understand that we
5 are on the same page, that I'm not making any
6 assumptions on whether or not you were asking the
7 Court -- the right to present witnesses.

8 So first is whether or not the death
9 sentence is allegedly unconstitutional because of a jury
10 instruction that was requested, but not given. I think
11 specifically that a single no vote would result in a
12 life sentence. And so you've raised that as a
13 constitutional issue. I'm assuming that there's no --
14 there's no witnesses or any factual matters that you
15 feel you need to develop in order to make that argument?

16 MS. ECKHOFF: I would note that we have
17 provided affidavits from jurors that indicate that there
18 were holdouts at the punishment phase that may have, if
19 they had understood that being -- that they didn't need
20 to bring nine of their friends along with them to find
21 for LWOP, that they may have done that. And we've
22 documented that, as best we could, in the affidavits
23 that we attached to the exhibits and -- I'm sorry,
24 exhibits that we attached to the application and that
25 potentially could require some further factual

1 development, but I'm not -- I can't specifically recall
2 at this moment if there's anyone in particular.

3 THE COURT: Okay. Next, you allege that
4 the death sentence was allegedly unconstitutional
5 because it was arbitrarily and capriciously assigned
6 based upon response to Special Issue No. 1 did not
7 define key terms that were requested by defense and also
8 poorly failed to narrow the class of death eligibility
9 to defendants.

10 And again, that seems to be a
11 constitutional issue that just turns on the instruction
12 to the jury. So same thing, I take it there's no other
13 witnesses you're needing, requesting the Court to
14 subpoena or come forward for an evidentiary hearing?

15 MS. ECKHOFF: That's correct.

16 THE COURT: And then finally: The death
17 sentence is ultimately unconstitutional because the
18 punishment charged allegedly limited the evidence the
19 jury could find mitigating. Again, it's same issue
20 dealing with the jury instruction.

21 MS. ECKHOFF: Correct.

22 THE COURT: Is there any other issue
23 that's -- that I have not addressed pertaining to, I
24 guess, in the general constitutional law issue?

25 MS. ECKHOFF: No.

1 THE COURT: All right. Finally, I think
2 you had also made a request to subpoena some of the
3 prosecutors in this case or the attorneys that were
4 actually on the prosecution team. Was that, again, in
5 furtherance of trying to establish the ineffective
6 assistance of counsel claims or is that relating to
7 another capacity?

8 MS. ECKHOFF: Do you mean the defense team
9 or prosecutors?

10 THE COURT: Well, if I saw correctly from
11 your original petition, was there not a request for you
12 to subpoena some of the prosecutors on this case?

13 MS. ECKHOFF: Yes. So the prosecutors, I
14 think, would be relevant to two issues. One is the
15 false testimony claim and the other is the Brady claim.
16 The two instances were, you know, we have alleged
17 misconduct by the State. The State has provided
18 affidavits from one of the three prosecutors who
19 provided -- who conducted this trial. We have not heard
20 from the other two, including Caroline Dozier, who was
21 present at the meetings, those earlier meetings with
22 Mr. Diaz.

23 And the same thing with regards to the
24 Brady, all of the information comes from Tracy Bennett
25 and a former prosecutor. However, clearly the State was

1 represented by more than just one attorney. And I can
2 envision wanting to cross-examine the other witnesses,
3 as well, about their knowledge of these things.

4 THE COURT: Okay. Ms. Eckhoff, is there
5 any other issue that I have not covered that you feel
6 needs to be addressed? I know we have kind of covered
7 several other areas, some of those we covered very
8 quickly. But as far as requests to present testimony of
9 actual witnesses developed in furtherance of your
10 clients case, is there any other witness that you're
11 seeking the Court to be present for an evidentiary
12 hearing that we have not discussed?

13 MS. ECKHOFF: At this time, no. I believe
14 in terms of the witnesses we have discussed, that is
15 right. However, I would just make clear that if we were
16 having an evidentiary hearing, it's entirely possible
17 that additional witnesses on these same issues may
18 arise.

19 THE COURT: Sure. In the realm of
20 possibilities, I've found that just about anything is
21 possible; but we can only work with the information that
22 we have at hand. So I think I can work through these
23 kind of in succinct order.

24 MS. ECKHOFF: Your Honor, before you do
25 that, would it be possible for me to just make one point

1 that I think is relevant here and just the emphasis on
2 we need the right to cross-examine here because the
3 Supreme Court has found that the right to cross-examine
4 is a necessary component in due process in cases where
5 the stakes aren't nearly so high as they are here today
6 in cases where welfare benefits are at issue or a parole
7 revocation.

8 And this is exactly the reason that, you
9 know, they say death is different because the Supreme
10 Court dictates that we strive for a heightened standard
11 of reliability in the outcomes of those cases. And
12 there's just some, as we've already discussed, some very
13 serious questions about whether Mr. Balderas actually
14 committed this crime.

15 THE COURT: Okay. I'll duly note that.

16 Ms. Hutchins, do you have any other final
17 thoughts that you would like to make?

18 MS. HUTCHINS: Judge, just to sort of
19 follow up on Ms. Eckhoff's final argument, while
20 jurisprudence does say that death is different, the
21 statements that Ms. Eckhoff makes about the due process
22 that is entitled to a defendant, there's no case law on
23 this saying that he's entitled to that in a post
24 conviction.

25 We refer the Court back to the statute and

1 to the interpretation of the statute, 11.07.1 in the
2 post conviction setting and what precisely is due and
3 what is not due unto him.

4 Also, in terms of -- I'm trying to think
5 of the final things just said. One moment, Judge.

6 THE COURT: Take your time.

7 MS. HUTCHINS: Just trying to think of the
8 very last thing she said.

9 Oh, actual innocence. She argued that
10 there still are some very serious concerns as to his
11 actual innocence in this case. And I would just point
12 out for the court that the defendant didn't allege
13 actual innocence as a ground in his writ. He's only
14 alleged ineffective assistance of counsel. And so if
15 that is one of their concerns, then it wasn't raised as
16 a ground.

17 MS. ECKHOFF: Your Honor, he has alleged
18 serious constitutional violations that if proven to have
19 occurred would impact the verdict at the guilt phase.

20 THE COURT: Well, I think, I can probably
21 surmise by looking it all over, the established case
22 law, any time there's going to be purported evidence of
23 actual innocence, that that's always going to be
24 important evidence to be considered.

25 But let me just start by running through

1 these things very quickly. If we go through the
2 constitutional art issues, it seemly to be everybody is
3 in agreement that those are issues of law, not
4 necessarily of facts; that there's no contested issues
5 of fact that have to be resolved on that; and the issues
6 that we have discussed, we can -- can be resolved
7 basically by reviewing the applicable law and the
8 established record.

9 As to the issue of ineffective assistance
10 of counsel, the Court has reviewed the affidavits of
11 Mr. Godinich and Mr. Nunnery. The Court finds that both
12 of these affidavits are extremely detailed and have a
13 lot of specificity as to facts and many of the issues
14 that have been raised within the petition.

15 The Court does not find that these
16 affidavits are ambiguous and do properly go to the
17 merits of the issues raised in the petition. And,
18 therefore, the Court does not find that it would be
19 necessary for those attorneys to present themselves for
20 cross-examination and that the factual matters alleged
21 are adequately addressed in the affidavits.

22 As to the Brady/Giglio disclosure issue,
23 the Court notes specifically on the first page of
24 Mr. Godinich's affidavit that he reviewed specifically
25 23 pages of notes that were from the district attorney's

1 office and that the information contained within those
2 notes was used by them during the course of Mr. Diaz' --
3 in preparation for trial and was used by Mr. Nunnery
4 during the course of his cross-examination.

5 The Court also notes that the request as
6 to the presentment of jurors and their exposure to
7 outside influences, specifically as Ms. Eckhoff
8 correctly stated, any questions that go to their
9 specific deliberations and how they resolve the case are
10 not admissible under the Rules of Evidence. And to ask
11 a juror under the abstract theory of what an average
12 juror would believe would be something that I don't
13 think that the juror, any juror would be able to
14 adequately weigh upon.

15 I feel that a juror would be able to
16 testify as far as what their feelings and expectations
17 were, but to look at the issue in abstract and how a
18 theoretical juror would look at it is too speculative
19 and would simply be unfair on a juror to have to weigh
20 in upon that.

21 Again, the Court hasn't found that the
22 affidavits submitted by the jurors are very detailed,
23 actually go into areas that would otherwise be
24 inadmissible; but the Court notes that there's nothing
25 in the affidavits that necessarily warrants needing to

1 bring in any jurors for additional questioning or
2 cross-examination on the factors that they were supposed
3 to.

4 However, the issues of the recanted
5 testimony, the Court does find that there are specific
6 issues that do warrant the development of additional
7 testimony. Specifically, as to Mr. Israel Diaz, there
8 is, in fact, evidence of -- that his testimony was, in
9 fact, recanted; that Mr. Balderas be provided an
10 opportunity to explore that testimony.

11 However, the Court does not find that the
12 testimony of the investigator, Adrian De La Rosa would
13 be probative because -- given the fact it would be a
14 hearsay statement, the State would not be able to
15 properly probe or cross-examine that hearsay statement
16 based upon solely the investigator's accounts of
17 Mr. Diaz' statement.

18 So the Court will provide -- will allow
19 the applicant to subpoena Mr. Diaz. However, the Court
20 will thus find that given there are potential issues
21 relating to perjury, if Mr. Diaz does not, in fact,
22 already have counsel representing him or advising him on
23 his constitutional issues, the Court will appoint an
24 attorney to represent him for the limited purpose of
25 that hearing to instruct him accordingly.

1 Further, the Court will all allow the
2 testimony of Anali Garcia and Octavio Cortes, who were
3 also alibi witnesses whose testimony was never
4 presented. The Court does give note and give
5 consideration to the fact that trial counsel had
6 interviewed those witnesses and did not find their
7 testimony, their purported testimony to be credible and
8 did not present that evidence. As officers of the
9 Court, obviously, any attorney is precluded under the
10 Rules of Ethics from presenting any testimony they
11 believe to be untruthful or perjured.

12 However, given that there's no record of
13 what their testimony would be, it's impossible for the
14 Court to look in abstract to consider the testimony.
15 And, therefore, the Court will provide Mr. Balderas with
16 the opportunity to present that testimony and proffer
17 that here in court, which would also be subject to
18 cross-examination by the State.

19 As to Jose Perez and Walter Benitez, the
20 Court finds that defense counsel did present that
21 testimony, trial counsel presented that testimony at the
22 trial itself; and that those issues were, in fact, put
23 before the jury and the fact finder. And based upon the
24 juries' verdicts, the jury did not find that testimony
25 to be credible. Therefore, the Court will not order

1 that those witnesses be produced.

2 So in summation, the Court will conduct an
3 evidentiary hearing involving Mr. Israel Diaz, Ms. Anali
4 Garcia and Mr. Octavio Cortes.

5 Counsel, how much time do you require in
6 order to locate those witnesses and serve them with
7 process for the hearing?

8 MS. ECKHOFF: Your Honor, in light of my
9 caseload and other cases, I would anticipate -- I would
10 request six months to set the hearing.

11 MS. HUTCHINS: Judge, may I be heard?

12 THE COURT: You may.

13 MS. HUTCHINS: Judge, Article 11.07(1)
14 specifically says that if there's to be an evidentiary
15 hearing that it shall be within 30 days, or an
16 additional 30 days for good cause. So 60 days, max.

17 THE COURT: I did actually print off a
18 copy of my statute and I was about to address the time
19 aspects. Counsel, I don't know that six months is
20 necessarily going to be an appropriate timeline. I
21 understand that you do have a hefty caseload and also a
22 hefty traffic schedule, given the courts that you
23 service; but at the same time, I know that this habeas
24 proceeding has carried on very much more lengthy than
25 what normally the rules are prescribed for it for

1 obvious procedural reasons.

2 And so, one of the issues I've raised is
3 that if some of those witnesses have not been located by
4 this time, I guess, the question I would have is are
5 they ever going to be located? Even if you were given
6 six months to provide them, are there particular
7 witnesses that you do not have any means in which to
8 contact them or to serve them with a subpoena?

9 MS. ECKHOFF: No, Your Honor. One of my
10 primary concerns pertaining to the witnesses is Octavio
11 Cortes. He's in the Marines. I am not certain at this
12 point where he is stationed, so I cannot -- I don't know
13 how long it might take to bring him in.

14 And I do recognize that this case has gone
15 on for quite a long time, but I'd also want to make
16 clear that, you know, we first requested this
17 evidentiary hearing a year and a half ago and it's the
18 State who wanted to proceed on affidavits from trial
19 counsel that ended up taking a year. This delay to get
20 to this point is based on what the State has requested.

21 I'm asking for additional time in order to
22 be able to adequately prepare, in light of all of the
23 other cases that I have evidentiary hearings and other
24 cities in Texas and applications that need to be filed.

25 MS. HUTCHINS: Judge, if I may be heard?

1 THE COURT: You may.

2 MS. HUTCHINS: At this point, based on
3 what you have stated, it seems like it's three
4 witnesses: Israel Diaz, Anali Garcia, Octavio Cortes.
5 Israel Diaz, we know where he is.

6 THE COURT: Right.

7 MS. HUTCHINS: We can get him here within
8 two weeks. Anali Garcia, it seems like counsel knows
9 where she is or at least can get hands on her. And if
10 Mr. Cortes is in the Marines and is somewhere else, that
11 may be someone that we could get a written affidavit
12 from as to what his testimony would be.

13 I know defense is very busy, they have
14 other accounts all over the state that they go to. On
15 our end, we also have a caseload that we are handling.
16 And we'd just ask if it's three witnesses, that we try
17 to work something out sooner rather than pushing it off.

18 THE COURT: Do you have specific knowledge
19 that Mr. Cortes is stationed abroad or is stationed
20 somewhere outside of the intercontinental United States?

21 MS. ECKHOFF: Not to my knowledge.

22 THE COURT: Okay. Well, then this is, I
23 think, how it would be best to proceed to give everybody
24 an opportunity to do their due diligence. Until we have
25 definitive knowledge that we're not going to be able to

1 comport with timelines subscribed by the rules, then
2 we're going to try to adhere to the rules and conduct
3 the hearing within the timeframe that the rules require.

4 If there is something that you believe
5 would warrant the Court -- I'm not even certain that the
6 rules would allow me to extend those deadlines for good
7 cause; but at least I'll give you an opportunity to
8 contact those witnesses and observe in the process if
9 there's a particular witness that you cannot find or
10 cannot be there, we can explore the issues of whether to
11 submit their information, be it affidavit or
12 telephonically, or in what other capacity you can to try
13 accommodate those witnesses and their availability.

14 But I think, as we sit right now, the
15 timeframe we're looking at is -- let's see.

16 Ms. Hutchins, you said it was 20 days?

17 MS. HUTCHINS: Thirty days, Your Honor.

18 THE COURT: Thirty days. So if we're
19 looking for a timeframe within 30 days, we'll need to
20 obviously check my own calendar, as well as the calendar
21 of the 179th to see if we can find a date within that
22 timeframe in which everyone can be available, make
23 themselves available.

24 And then, in the meantime, if you have any
25 issues locating those witnesses or making those

1 witnesses available to present their testimony, we can
2 cross that bridge when we get there.

3 MS. ECKHOFF: Okay.

4 MS. HUTCHINS: Judge, in terms of
5 Mr. Diaz, is the Court going to appoint counsel,
6 assuming that he does not have counsel and is not
7 represented? Is that going to be appointed now or when
8 he gets back to Harris County or how is that going to
9 work?

10 THE COURT: I was going to appoint an
11 attorney to represent him today since I've said that he
12 is going to be subject to subpoena. And that's assuming
13 that he doesn't already have counsel.

14 If I appoint an attorney to represent him
15 and he contacts Mr. Diaz, and says, No, I already have
16 an attorney, the rules don't preclude him from having
17 multiple attorneys, but if there's another counsel that
18 represents him we'll, at least, be able to ascertain
19 that. But given the short time period, I would like to
20 give the attorney enough opportunity to meet with him,
21 discuss this issue with him, and then be able to make
22 that particular recommendation.

23 Ms. Eckhoff, if the attorney that we
24 appoint to represent Mr. Diaz indicates that he's going
25 to recommend to his counsel to invoke his Fifth

1 Amendment right not to testify, are you still going to
2 persist in wanting to bring that witness here and have
3 him invoke his Fifth Amendment on the stand? Or are
4 you -- would that affect your decision to call him as a
5 witness?

6 And I'll allow you to make a record of
7 that. If you don't, you can make a record of your
8 correspondence with his attorney if that's something
9 you'd like to do.

10 MS. ECKHOFF: At this time, Your Honor, I
11 believe we would want him on record. And I will reserve
12 the right to change my mind.

13 THE COURT: Very well.

14 MS. ECKHOFF: And I would just point out,
15 to my knowledge, he's not longer incarcerated.

16 MS. HUTCHINS: I haven't checked, I don't
17 know.

18 THE COURT: Well, if he is no longer
19 incarcerated or if he's on parole, there's typically
20 other mechanisms on how to locate that witness.

21 MS. ECKHOFF: Right.

22 THE COURT: But if he is not incarcerated,
23 I'll allow your officers an opportunity to try and find
24 him and have him served. So -- and likewise, if there's
25 counsel that's been appointed, they also would probably

1 be engaged in trying to track him down. If for some
2 reason he's not incarcerated and he is located, just
3 remember that I have appointed independent counsel to
4 represent him so please refrain from directly
5 communicating with him without, at least, notifying that
6 counsel.

7 MS. ECKHOFF: Okay.

8 THE COURT: Is there anything else we need
9 to take up while we are all here on the record?

10 MS. ECKHOFF: Your Honor, I did want to
11 raise one thing. At the last hearing the State
12 indicated that were going to turn over their capital
13 murder summary. They agreed that we were entitled to it
14 and they haven't turned it over and I would like a copy
15 of that, please.

16 MS. HUTCHINS: Not actually accurate,
17 Judge.

18 So the capital murder summary -- I'm not
19 sure if the Court is aware of what a capital murder
20 summary is in Harris County, Texas. It is --
21 essentially, it is work product. It is quintessential
22 work product. It is what the chief prosecutor in a
23 court prepares on a capital murder cases summarizing the
24 facts of the offense, as well as any aggravating
25 circumstances and mitigating circumstances, and then

1 makes a recommendation up the chain of hierarchy as to
2 what his or her recommendation is in terms of seeking
3 death or seeking life.

4 So a recommendation comes from the court
5 chief, then I believe the division chief, the bureau
6 chief, all the way up to the assistant district
7 attorney. And so, I mean that is essentially work
8 product in terms of everything, their thought process
9 and what goes into it.

10 In this case, it's become an issue as to
11 whether or not it contained certain information that may
12 be Brady. That's, I guess, what defense counsel's
13 concern is in terms of wanting to see it. There were
14 also -- the State is certainly aware of our obligation
15 under Brady to turn over anything that might tend to
16 negate his guilt or be impeachment evidence or whatnot,
17 certainly.

18 The issue in this case is while capital
19 murder summaries are work product, Spence Graham, the
20 former prosecutor in this case provided an affidavit
21 stating that it was in the State's file, not hidden away
22 from defense counsel and that defense counsel had the
23 opportunity to be able to view it.

24 THE COURT: And when you say "defense
25 counsel" you mean trial counsel?

1 MS. HUTCHINS: Trial counsel, correct.
2 Trial counsel, while the case was under Spence, had the
3 opportunity to be able to view it. Now, whether or not
4 they actually viewed it, I can't say; but it was made
5 available technically to defense counsel. Under the
6 Rules of Discovery, as I understand them, if it's
7 something that original trial counsel had or reviewed,
8 then trial counsel there on out would also have that
9 same ability.

10 I would like to assert the State's work
11 product privilege to it. I do believe it's work
12 product. I am prepared to turn over a copy to the Court
13 for the Court's in camera review so the court can make a
14 determination whether or not it needs to be turned over.
15 If you believe there's an impeachment or Brady evidence
16 in there, I have that copy for you, Because we would
17 like to assert our work product privilege and ensure
18 that we are not otherwise waiving our privilege to
19 anything else in final.

20 THE COURT: Well, I agree with you that if
21 it's internal documents that are comprised based upon
22 the prosecutor's assessment of the facts and their
23 individual opinions, it sounds like it's textbook work
24 product.

25 Now, if the rules of Brady should always

1 apply, if there's any information in that report that is
2 either exculpatory or goes to the witnesses'
3 credibility, in other words, the prosecutor says, In my
4 opinion, I don't find this witness to be truthful, or
5 they have the opinion of something going to credibility
6 that potentially could be Giglio evidence, there's
7 always a running obligation to disclose that
8 information. You don't have to disclose the report, but
9 the exculpatory or impeachment evidence would need to be
10 disclosed.

11 So I'm -- if the parties would prefer, if
12 you would like for me to view that in camera in order to
13 make that assessment, if it would give Ms. Eckhoff peace
14 of mind for me to do that, I'll be happy to do that.
15 But counsel, like I said, as an officer of the court
16 there's always the running duty and obligation to make
17 the Brady disclosures if it's discovered.

18 MS. ECKHOFF: Right, Your Honor. And I
19 understand that, but the basis for our request at this
20 point is actually many slightly different than just
21 Brady. Our original request was Brady and the original
22 response from the State was that was never turned over
23 because it was work product and we accepted that answer.
24 And it's only after Mr. Graham provided an affidavit
25 saying it was made available to trial counsel that we

1 renewed our request for that because we, as successor
2 counsel, should have access to all of the information
3 available to trial counsel. That's what -- we are
4 entitled to their file and to anything that they had
5 access to.

6 And so, whether or not it contains Brady
7 at this point is sort of immaterial because it was made
8 available to trial counsel and we should be able to view
9 it.

10 THE COURT: Well, you know, different
11 files have different requirements on open-file policies.
12 And I note that often district attorneys' offices or
13 other prosecuting authorities will have discovery that
14 exceeds the statutory and legal requirements of
15 discovery. But if -- I don't necessarily know or, I
16 guess it -- I would have to -- I'd probably have to go
17 and brief the issue to see whether or not an open file
18 policy at one time that is later amended would
19 permanently waive work product privilege for items in
20 that file for the duration of the case.

21 I don't necessarily know if that's the
22 case or not, but if the main issue or crux of reviewing
23 the particular documents is looking for exculpatory or
24 impeachment information, which would be the logical
25 purpose -- I mean, is there any other basis you would

1 have for wanting to review that, those notes or that
2 report?

3 MS. ECKHOFF: We want to have an
4 understanding of what information was available to trial
5 counsel at the time of trial.

6 THE COURT: Well, I think you could
7 probably ascertain that information from the
8 discoverable items within the file, as a whole, as far
9 as what reports and documents were in the file. But if
10 this is simply the fact of whether or not to seek the
11 death penalty and then the strengths and weaknesses and
12 mitigating issues, again, this just being a summary, I
13 think probably the easiest way to address that is
14 obviously to do an in camera inspection.

15 I mean, ultimately, as I said before, the
16 goal isn't necessarily to have a fishing expedition. If
17 there's particular information that you believe is going
18 to be relevant to this habeas proceeding or would weigh
19 mitigating evidence or undisclosed bias or undisclosed
20 impeachment evidence, I think we could ascertain that by
21 in camera review.

22 But is there a particular piece of
23 evidence that you are wanting to see if it's contained
24 within that report?

25 MS. ECKHOFF: I have no idea what might be

1 in the report because, as the State has indicated, that
2 to my knowledge this is not something that is typically
3 made available to anyone outside of their office. But
4 for whatever reason, it was made available to trial
5 counsel in this case.

6 And while I take your point that, you
7 know, we should be able to review trial counsel's file
8 to get a sense of what they knew and didn't know about
9 this case, our review of trial counsel's file in this
10 case doesn't have the notes at issue in the Brady claim.

11 So without them having come from the
12 State, we would have never known that trial counsel had
13 viewed them. It's sort of a similar situation. I can't
14 tell you what I need to see from there because I don't
15 have any idea what it contains, but I know trial counsel
16 saw it or at least had it available to them. And in
17 order to make a record of what trial counsel did or did
18 not have going into trial and how that may have affected
19 or contemplated -- affected their tragedy or their
20 claims of strategy, you know, I need to be able to
21 review what they had reviewed. That's why we go and
22 review the Diaz file in this case.

23 THE COURT: Well, we're talking about a
24 report that was based upon the prosecutor's assessment
25 of the file. It's one thing if it was a police report

1 that was produced by an investigator, or a detective, or
2 somebody that was looking at the case. If it's just a
3 prosecutor's own assessment of the file and a
4 recommendation based upon his opinions and viewing of
5 the evidence, it seems to be textbook work product.

6 I mean, do you -- is there any case law or
7 do you have any authority that would go to show that if
8 something that was work product privilege that was made
9 available in an open file policy, would forever waive
10 the right to assert work product privilege?

11 MS. ECKHOFF: Not off the top of my head,
12 but I would like an opportunity to brief it.

13 THE COURT: Well, I will do this. I will
14 conduct an inspection review of the report. And I'm
15 specifically looking for -- we've had a lengthy
16 discussion here and it's very well briefed with the
17 issues that you believe exist. And if there's anything
18 pertaining to relevant impeachment evidence, exculpatory
19 evidence or anything that would significantly weigh on
20 the issues before us that have not already been
21 identified or discussed, then we could certainly take
22 that up once we get to the evidentiary hearing.

23 If you find a case that says that the work
24 product has been waived because it's been voluntarily
25 disclosed and open file policy, then that's a legal

1 issue that would be closed in which case it would be an
2 open part of discovery.

3 MS. ECKHOFF: Okay.

4 THE COURT: So I will give you the
5 opportunity to do that and follow up with that. But
6 in the mean time, I'll accept a copy, sealed copy of the
7 exhibit and we will review that. In which case, if
8 there is pertinent information I'll notify the parties
9 accordingly.

10 MS. ECKHOFF: Thank you.

11 THE COURT: Okay. Is there anything else
12 we need to take up while we are all here on the record?

13 MS. HUTCHINS: Just to touch up on that,
14 if I may?

15 If the Court does find pertinent
16 information, obviously it will be disclosed. If the
17 Court does not find pertinent information in the capital
18 murder summary, at that point I would make a motion to
19 place it under seal with the file in this case.

20 THE COURT: I will accept it right now as
21 a sealed exhibit, but if -- in that it will be
22 maintained, confidentiality. Traditionally what I've
23 always done is if it's something that is privileged,
24 I'll return it to the submitting party because of the
25 fact that if it goes into the record as a privileged

1 item -- it's not something that typically would go into
2 the record because the privilege has been exerted.

3 But at this time it's been tendered as an
4 exhibit for in camera review, which we maintain sealed
5 in which case until the time the Court has had an
6 opportunity to review it and make a determination on the
7 issues that I've already addressed.

8 Anything else that we need to take up?

9 MS. HUTCHINS: In terms of setting a date,
10 are we going to do that today or via email?

11 THE COURT: I will probably do it via
12 email because I'll need to bring my court coordinator
13 into the loop to make sure that I can find a date where
14 I'm not already set for trial in the 136th over in
15 Beaumont. And so I'll do my best to work with
16 everyone's schedule.

17 I understand -- I take it an afternoon
18 setting is probably preferential, but if you believe
19 that you're going to need more than just half a day to
20 present evidence, then we will set it for a morning
21 hearing so you'll have adequate time to present your
22 witness and also have adequate time for
23 cross-examination.

24 MS. HUTCHINS: And will it be here in
25 Houston, Judge?

1 THE COURT: That will be, I guess, by
2 default where I'll have it unless y'all would prefer to
3 come to Beaumont. If the agreement of the parties would
4 be to go there because it's more convenient, I would be
5 happy to do that; but given that this is a -- the
6 hearing is in Harris County -- and, obviously, I know
7 there's people who have been in attendance that are
8 following this case for the convenience of Mr. Balderas.
9 I was, by default, going to have it here in Harris
10 County unless the attorneys would prefer otherwise?

11 MS. ECKHOFF: No, we appreciate that, Your
12 Honor.

13 THE COURT: If there's nothing further,
14 the Court stands adjourned.

15 *(Court adjourned for the day.)*
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25

1 STATE OF TEXAS

2 COUNTY OF HARRIS

3 I, Marcia E. Barnett, Official Court Reporter in and
4 for the 179th District Court of Harris, State of Texas,
5 do hereby certify that the above and foregoing contains
6 a true and correct transcription of all portions of
7 evidence and other proceedings requested in writing by
8 counsel for the parties to be included in this volume of
9 the Reporter's Record in the above-styled and numbered
10 cause, all of which occurred in open court or in
11 chambers and were reported by me.

12 I further certify that this Reporter's Record of the
13 proceedings truly and correctly reflects the exhibits,
14 if any, offered by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record is \$ 421.07 and
17 was paid/will be paid by Harris County.

18 WITNESS MY OFFICIAL HAND on this, the 5th day of
19 March, 2018.

20

21 /s/Marcia E. Barnett
22 Marcia E. Barnett, CSR
23 Texas CSR 5144
24 Deputy Court Reporter
25 179th District Court
201 Caroline
Houston, Texas 77002
Telephone: (832) 927-3735
Expiration: 12/31/2019

IN THE 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS

_____	)	Trial Cause No.
EX PARTE	)	1412826-A
Juan Balderas,)	
APPLICANT	)	[PROPOSED] ORDER
)	
_____)	

ORDER DESIGNATING ISSUES FOR EVIDENTIARY HEARING:

The Court designates the following issues in Mr. Balderas's Initial Application for Writ of Habeas Corpus for further factual development via live evidentiary hearing:

- (1) whether a key State's witness at trial, Israel Diaz, testified falsely against Mr. Balderas; and
- (2) whether Mr. Balderas's trial counsel rendered ineffective assistance of counsel at his trial when they failed to investigate and present evidence of Mr. Balderas's alibi, including the testimony of key alibi witnesses Anali Garcia and Octavio Cortez.

ORDERED AND SIGNED on this ____ day of March, 2018.

The Honorable Baylor Wortham
Judge Sitting by Assignment
179th Judicial District Court

CAUSE NO. 1412826-A

EX PARTE

§

IN THE 179th DISTRICT

§

COURT OF

JUAN BALDERAS,
Applicant

§

HARRIS COUNTY, TEXAS

**STATE'S PROPOSED SUPPLEMENTAL ORDER DESIGNATING ISSUES
TO BE RESOLVED VIA EVIDENTIARY HEARING**

Based on this Court's review of the habeas record and the argument of counsel, this Court **FINDS** that the following controverted, unresolved factual issues potentially material to the legality of the applicant's confinement will be addressed by means of a narrowly tailored evidentiary hearing:

- to assist the Court in resolving the issue of whether the State either knowingly or unknowingly presented false testimony at trial through Israel Diaz, this Court will permit the applicant to attempt to present the testimony of Israel Diaz specific to whether Diaz is recanting his trial testimony, whether Diaz was pressured by the State pretrial to "change" his testimony, and whether Diaz testified falsely under oath at the applicant's trial; and
- to assist this Court in resolving the issue of whether trial counsel was ineffective for failing to investigate and present evidence of an alibi defense during the guilt/innocence phase of trial, this Court will permit the applicant to present the testimony of Anali Garcia and Octavio Cortes limited to what these witnesses would have stated if called to testify during the guilt-innocence phase.

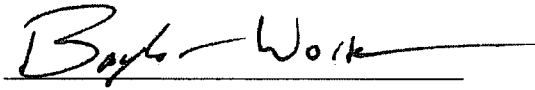
Therefore, this Court **ORDERS** an evidentiary hearing to resolve these issues pursuant to **TEX. CRIM. PROC. CODE** art. 11.071 §§ 9, 10.

The Clerk of the Court is **ORDERED** to transmit the Court's instant supplemental order designating issues to the Court of Criminal Appeals.

The Clerk of the Court is **ORDERED NOT** to transmit any additional documents in the above-styled case to the Court of Criminal Appeals until further ordered.

By the following signature, the Court adopts the State's Proposed Supplemental Order Designating Issues to be Resolved via Evidentiary Hearing in Cause Number 1412826-A.

SIGNED this 21st day of March, 2018.

A handwritten signature in black ink, appearing to read "Baylor Wortham", written over a horizontal line.

The Honorable Baylor Wortham
Presiding Judge by Assignment
179th District Court
Harris County, Texas



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

March 26, 2018

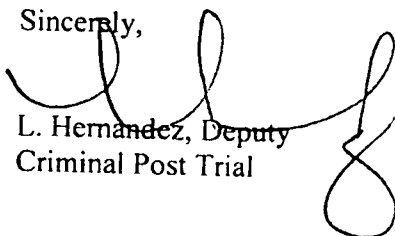
KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 1412826-A in the 179th District Court.

- ☐ State's Original Answer Filed
- ☐ Affidavit
- ☐ Court Order Dated
- ☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.
- ☐ Respondent's Proposed Findings of Fact and Order
- ☒ Other

Sincerely,



L. Hernandez, Deputy
Criminal Post Trial

Enclosure(s) – STATE'S PROPOSED SUPPLEMENTAL ORDER DESIGNATING
ISSUES TO BE RESOLVED VIA EVIDENTIARY HEARING



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

March 26, 2018

KELLEY REYES
COURT OF CRIMINAL APPEALS
P.O. BOX 12308
CAPITOL STATION
AUSTIN, TEXAS 78711

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L. Hernandez, Deputy
Criminal Post Trial

Enclosure(s) – STATE'S PROPOSED SUPPLEMENTAL ORDER DESIGNATING
ISSUES TO BE RESOLVED VIA EVIDENTIARY HEARING



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

March 26, 2018

DEREK VERHAGEN
ATTORNEY AT LAW
1700 N. CONGRESS AVE., STE. 460
AUSTIN, TEXAS 78701

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- ☒ Other

Sincerely,

A handwritten signature in black ink, appearing to be "L. Hernandez", is written over the typed name.

L. Hernandez, Deputy
Criminal Post Trial

Enclosure(s) – STATE'S PROPOSED SUPPLEMENTAL ORDER DESIGNATING
ISSUES TO BE RESOLVED VIA EVIDENTIARY HEARING

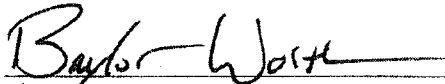
IN THE 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS

_____	)	Trial Cause No.
EX PARTE	)	1412826-A
Juan Balderas,)	
APPLICANT)	[PROPOSED] ORDER
)	
_____)	

ORDER

On this date, the Court considered Applicant's Motion for Extension of Time to Prepare for Evidentiary Hearing. After due consideration, Applicant's Motion is GRANTED. The evidentiary hearing will begin on May 11, 2018.

ORDERED AND SIGNED on this 21st day of March, 2018.


The Honorable Baylor Wortham
Judge Sitting by Assignment,
179th Judicial District Court



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

March 26, 2018

KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

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- ☒ Other

Sincerely,


L. Hernandez, Deputy
Criminal Post Trial

Enclosure(s) -ORDER



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

March 26, 2018

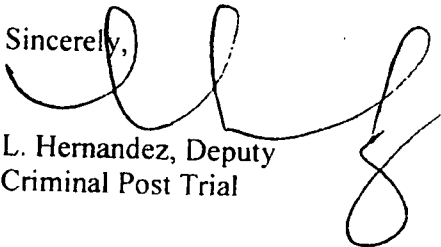
DEREK VERHAGEN
ATTORNEY AT LAW
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AUSTIN, TEXAS 78701

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Sincerely,


L. Hernandez, Deputy
Criminal Post Trial

Enclosure(s) -ORDER

**IN THE 179th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS**

_____)	Cause No.
EX PARTE)	1412826-A
JUAN BALDERAS,)	
APPLICANT)	Hearing date: May 11, 2018
_____)	
)	

**MOTION TO COMPEL DISCLOSURE OF EXCULPATORY AND
IMPEACHMENT EVIDENCE**

Juan Balderas, by and through his counsel the Office of Capital and Forensic Writs (OCFW), files this motion seeking production of the following materials in the possession, custody, or control of the State,¹ relevant to the claims pending before this Court, and with respect to which this Court has set an evidentiary hearing to commence on May 11, 2018. In support of this motion, Mr. Balderas respectfully states the following:

¹ In this motion, Mr. Balderas uses the word "State," which should be interpreted as including, but not limited to, any member of the HCDAO, Houston Police Department, Harris County Sheriff, Harris County Probation Department, and any other governmental entity involved in the investigation of the underlying offense, the prosecution of Mr. Balderas and Mr. Diaz, the incarceration of Mr. Balderas or Mr. Diaz, or the release of Mr. Diaz.

I.

RELEVANT BACKGROUND

On December 26, 2017, following a series of proceedings that resulted in the recusal of a prior judge, this case was reassigned to the Honorable Baylor Wortham for disposition of Mr. Balderas's Initial Application for Writ of Habeas Corpus Pursuant to Article 11.071 of the Texas Code of Criminal Procedure (Initial Application), and to dispose of any other business requested by the Court. *See* Exhibit A, Order of Assignment by the Presiding Judge. Judge Wortham contacted the undersigned counsel, Erin Eckhoff and Katherine Black of the OCFW, as well as counsel for the State, Farnaz Hutchins and Shawna Reagin of the Harris County District Attorney's Office (HCDAO), via email, requesting input regarding the scheduling of a "writ hearing" (later clarified to be a status hearing) in the case. Both parties responded, also via email, regarding the scheduling of a hearing and a status hearing was set in the matter for February 22, 2018.

At the February 22 status hearing, the Court heard argument from both parties on numerous substantive issues raised in Mr. Balderas's Initial Application. At the conclusion of the hearing, the Court determined that several of the claims for relief Mr. Balderas had raised in his Initial Application warranted additional factual development via live evidentiary hearing. One of these claims was a claim that a key witness for the State, Israel Diaz, had testified falsely against Mr. Balderas at

his capital trial in 2014. The Court determined that Mr. Balderas should be provided “an opportunity to explore” the testimony of Mr. Diaz by subpoena to an evidentiary hearing; however, the Court also found that “given there are potential issues relating to perjury,” that it was necessary to appoint Mr. Diaz an attorney “to represent him for the limited purpose of that hearing to instruct him accordingly.” *See* Exhibit B, February 22, 2018 Writ Hearing Transcript, at 60. The Court further found that Mr. Balderas should be allowed to present the testimony of Anali Garcia and Octavio Cortes, two alibi witnesses whose testimony was not presented at Mr. Balderas’s trial but who signed affidavits that Mr. Balderas filed in support of his Initial Application. *Id.* at 61.

Following the February 22, 2018 writ hearing, the Court and the parties exchanged emails regarding the scheduling of an evidentiary hearing in the case. The Court also appointed counsel for Mr. Diaz, for the limited purpose of advising him regarding constitutional (Fifth Amendment) issues.²

² Danny Lacayo of the Harris County Public Defender’s Office. Counsel for Mr. Balderas first became aware of Mr. Lacayo’s appointment via electronic communication from the HCDAO, when ADA Hutchins copied Mr. Balderas’s counsel on a string of electronic messages to Mr. Lacayo. On March 19, 2018, Mr. Lacayo contacted the Court and both parties via email (attached as Exhibit C). Mr. Lacayo’s email contained the following message:

My name is Danny Lacayo with the Public Defender’s Office. I was assigned to represent Israel Diaz in the Writ Hearing regarding Juan Balderas. I have attached all parties involved in this email. I was reviewing the Writ and evidence attached and noticed that there was a witness named Christopher Pool who testified in the trial. The writ

For the reasons set forth below, Mr. Balderas, through counsel, respectfully requests that this Court issue an order directing the State to produce the materials listed below to counsel for Mr. Balderas.

II.

ARGUMENT AND AUTHORITIES

Mr. Balderas respectfully requests the Court order the State to disclose the following materials, all of which are relevant to specific claims pending before this Court in the Article 11.071 proceeding, including those that are the subject of the evidentiary hearing set to commence May 11, 2018, at which Israel Diaz -- a key witness for the State who testified against Mr. Balderas at trial -- is expected to

alleged that he provided false testimony regarding his termination in regards to an inmate death. While at the Harris County District Attorney's Office I worked in Police Integrity for a period of time. I believe that I investigated the incident regarding Detention Officer Pool. This case was eventually presented to a grand jury which returned a no bill. I know that this is an important case to everyone and wanted full disclosure to all parties involved that I investigated one of the witnesses in this case. I am not sure if you wanted to keep me on the case and wanted your guidance. If you believe that there is some conflict I can have the case re-assigned within the Harris County Public Defender's Office.

See Exh. C Page 2, email from Mr. Lacayo.

Mr. Lacayo subsequently arranged for the re-assignment of this appointment as counsel for Mr. Diaz within the Harris County Public Defender's Office. Mr. Diaz is currently represented by Genesis Draper.

testify.³ Mr. Balderas is entitled to these materials because he would have been entitled to them prior to trial, and because they may contain information relevant to Diaz's testimony at the upcoming post-conviction evidentiary hearing. Defense counsel are entitled to all materials "favorable" to a defendant of which the State has constructive knowledge, not just self-evidently exculpatory material. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also, Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (noting that defendants are entitled to 'favorable evidence known only to the police'). This duty to disclose includes any information that could be used to impeach witnesses against Mr. Balderas. *See Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 668 (2004); *United States v. Bagley*, 473 U.S. 667 (1985) (prosecution's duty to disclose any information tending to show a witness's bias in favor of the government or against the defendant or that otherwise impeaches a witness's testimony); *Napue v. Illinois*, 360 U.S. 264 (1959) (due process violated where important witness for the State in a murder prosecution falsely testified that witness

³ Prior discovery provided by the State has included some exculpatory material, but counsel has a good faith belief that additional exculpatory material exists and is in the possession of the State. In light of what he has already received, and in anticipation of Mr. Diaz's testimony at the May 11, 2018 evidentiary hearing, Mr. Balderas makes the following requests for disclosure, as such information would constitute exculpatory or impeachment evidence to which Mr. Balderas is entitled under *Brady v. Maryland*.

had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration, and Assistant State's Attorney did nothing to correct false testimony); *Mooney v. Holohan*, 294 U.S. 103 (1935). Withholding of such evidence violates due process if the evidence is material to either guilt or punishment, irrespective of whether the State knowingly withheld information. *Brady*, 373 U.S. at 87. According to the Supreme Court, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks*, 540 U.S. at 675-76.

The Texas discovery statute mirrors these constitutional requirements. *See* TEX. CODE CRIM. PROC. ART. 39.14(h) ("[T]he state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."). This statute also explicitly extends this requirement to materials not discovered by the State until after trial. TEX. CODE CRIM. PROC. ART. 39.14(k) ("If at any time before, during or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court."). While the underlying offense occurred before this statute was enacted, the Court of

Criminal Appeals has discussed this provision in the context of a crime that occurred before the statute's enactment, leaving open the prospect that this section applies retroactively to all offenses. *See Francis v. State*, 428 S. W. 3d 850, 856 n.12 (Tex. Crim. App. 2014).

III. DISCOVERY REQUESTED

In light of the State's disclosure obligations under *Brady* and its progeny, as well as the specific claims pending before this Court in the Article 11.071 proceeding, including the evidentiary hearing set to commence on May 11, 2018, counsel for Mr. Balderas respectfully request an order from this Court compelling the State to produce the following:

1. Copies of any and all Harris County jail records for **Israel Diaz** (DOB 04/09/1986), including, but not limited to all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, and gang association information.
2. Copies of any and all communications and contact between **Israel Diaz** (DOB 04/09/1986), or his representatives, and the HCDAO, including, but not limited to: emails, text messages, phone messages, in-person conversations (notes and memos) and telephonic communications (and notes and memos) from 2004 to the present.

3. Additionally, Mr. Balderas specifically requests that any oral communications between **Israel Diaz** (DOB 04/09/1986) and the HCDAO that take place in advance of the May 11, 2018 hearing be recorded and a copy of the recording produced to counsel for Mr. Balderas in advance of the hearing.
4. The entire HCDAO case file for **Israel Diaz** (DOB 4/09/86) including but not limited to communications with Diaz, status notes/reports, third party communications, references to the murder of Eduardo "Powder" Hernandez, and any references to cooperation with the State in the following cases: *State v. Juan Balderas* (Cause No. 1050630); *State v. Efrain Lopez* (Cause No. 10500629 or Cause No. 1305940 or Cause No. 1428270); *State v. Jose Hernandez* (Cause No. 1050633).
5. Files kept and maintained by the Harris County District Attorney for any criminal case charging **Israel Diaz** (DOB 04/09/86) from 2003-2008, including all reports, notes, communications, witness lists, charging documents, promises/rewards/inducements, case resolution, and any reference to Eduardo Hernandez as a witness.
6. Communications, including but not limited to, emails, letters, voicemails, and any oral communications reduced to writing between employees and

agents of the HCDAO and employees of the Harris County Department of Probation regarding **Israel Diaz** (DOB 04/09/86).

7. The entire Harris County Department of Probation case file for **Israel Diaz** (DOB 4/09/86) including but not limited to communications with Diaz, status notes/reports, third party communications, references to the murder of Eduardo "Powder" Hernandez, and any references to cooperation with the State in the following cases: *State v. Juan Balderas* (Cause No. 1050630); *State v. Efrain Lopez* (Cause Nos. 1050629, or 1305940, or 1428270); *State v. Jose Hernandez* (Cause No 1050633).
8. All agents' (federal, state, local and administrative agency) rough notes of interrogations or debriefings of **Israel Diaz** (DOB 04/09/86).
9. All prior written, recorded, or oral statements of **Israel Diaz** (DOB 04/09/86) relating to this case that were made to anyone, and all law enforcement agents' rough draft notes of interviews with Diaz.
10. The prior arrest and conviction records of **Israel Diaz** (DOB 04/09/86), including his complete criminal history, and the docket number and jurisdiction of all prior and pending cases.
11. All evidence that **Israel Diaz** (DOB 04/09/86) has ever (a) made any false statement to the authorities, whether or not under oath or under penalty of

perjury, and/or (b) does not have a good reputation in the community for honesty. TEXAS RULE OF EVIDENCE 608(a).

12. All evidence that **Israel Diaz** (DOB 04/09/86) has ever made a false, contradictory, or inconsistent statement with regard to this case, or any statement showing bias or a motive to fabricate. *Pennsylvania v. Ritchie*, 480 U.S. 9 (1987).
13. All evidence that the statements of **Israel Diaz** (DOB 04/09/86) are inconsistent with or contradicted by that of any other person or prospective witness. *Kyles*, 514 U. 419.
14. Any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between **Israel Diaz** (DOB 04/09/86) and law enforcement or prosecutorial agent or agency (federal, state, and local). This request includes any explicit or implicit understanding relating to criminal or civil income tax liability, and/or immigration proceedings. *Kyles*, 514 U.S. at 432-34.
15. All evidence of discussion about, or *advice* concerning, any contemplated prosecution of **Israel Diaz** (DOB 04/09/86), or any possible plea bargain, even if no bargain was made, or the advice not followed. *Brown v. Dugger*, 831 F.2d 1547, 1555-56 (11th Cir. 1987) (Clark, J., concurring) (evidence

that witness sought plea bargain is to be disclosed, even if no deal struck)

Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985).

16. Copies of any and all jail records for **Alejandro Garcia** (DOB 02/02/1989), a testifying witness against Mr. Balderas at the punishment phase of Mr. Balderas's trial, including, but not limited to, all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, gang association information, jobs, classes, trainings, and commissary.
17. Copies of any and all communications and contact between **Alejandro Garcia** (DOB 02/02/1989) and the Harris County District Attorney's Office, including, but not limited to, emails, texts, phone messages, in-person conversations and notes and memos, phone conversations and notes/memos, etc., between 2005 and present.
18. Copies of any and all jail records for **Edgar Rene Ferrufino** (DOB 05/10/1988), including but not limited to all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, gang association information, jobs, classes, trainings, and commissary.
19. The Police Integrity Division file regarding **Christopher Scott Pool**, a former detention officer for Harris County Sheriff's Department, who was

employed as a detention officer from May 2009 to August 2012, and who testified for the State in Mr. Balderas's trial.

20. The entire Internal Affairs Department investigation file regarding **Christopher Scott Pool**, a former detention officer for the Harris County Sheriff's Office, employed from May 2009 to August 2012, who testified for the State at Mr. Balderas's trial.

21. Copies of any and all records in the Permanent File of Israel Diaz **Israel Diaz** (DOB 04/09/86); TDCJ No. 1970763), including, but not limited to, medical and mental health screenings; IQ and educational testing; reports and decisions by and to the Classification Committee; visitation logs, disciplinary records, and all parole and probation records and documents.

22. All parole and probation records and documents related to **Israel Diaz** (DOB 04/09/86), including, but not limited to, medical and mental health screenings, initial interviews, reports, and decisions for incarcerations from 2003 to the present.

23. The entire trial file for the case of State v. Juan Balderas, as made available to Mr. Balderas's trial counsel.

IV.
PRAYER

WHEREFORE, for the foregoing reasons, Mr. Balderas respectfully requests that this Court direct the State to disclose the above-listed information to counsel for Mr. Balderas (the OCFW) within ten days of signing an order.

Respectfully submitted,
/s/ Katherine Froyen Black
KATHERINE FROYEN BLACK

BENJAMIN B. WOLFF, Director (No. 24091608)
(Benjamin.Wolff@ocfw.texas.gov)
ERIN M. ECKHOFF (No. 24090910)
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NATALIE CORVINGTON (No. 24107401)
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Office of Capital and Forensic Writs
1700 N. Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600
(512) 463-8590 (fax)

Attorneys for Mr. Balderas

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing upon:

Office of the Harris County District Attorney
Attn: ADA Farnaz Hutchins

This certification is executed on April 19, 2018, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Katherine Froyen Black
Katherine Froyen Black



Eleventh Administrative Judicial Region of Texas

Olen Underwood
Acting Presiding Judge
Rebecca Brite
Acting Administrative Assistant

December 28, 2017

Honorable Baylor Wortham
1085 Pearl Street
Beaumont, TX 77701

Dear Judge Wortham:

Enclosed please find assignment #182 for the 179th Judicial District Court of Harris County to hear Cause No. 1412826-A; Ex Parte Juan Balderas and to dispose of any other business requested by the court.

If you have any questions feel free to call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rebecca Brite".

Rebecca Brite
Enclosure(s)

THE STATE OF TEXAS

ELEVENTH ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

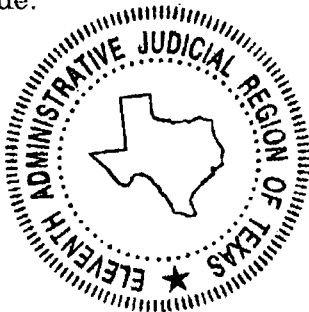
Pursuant to Section 74.056, Texas Government Code, I hereby assign the Honorable **Baylor Wortham**, Active District Judge, 136th Judicial District Court, to the **179th Judicial District Court of Harris County, Texas**.

This assignment begins the 28th day of December, 2017 and is for the primary purpose of hearing cases and disposing of any accumulated business requested by the court.

This assignment shall continue as may be necessary for the assigned Judge to dispose of any accumulated business and to complete trial of any case or cases begun during this assignment, and to pass on motions for new trial and all other matters growing out of accumulated business or cases heard before the Judge herein assigned, or until terminated by the Presiding Judge.

It is ordered that the Clerk of the Court to which this assignment is made, if it is reasonable and practicable, and if time permits, give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned Judge.

It is further ordered that the Clerk, upon receipt hereof, shall post a copy of this order in a prominent place in the public area of the Clerk's office. This posting shall constitute "Notice of Assignment" as required by Section 74.053, Texas Government Code.



Ordered this 28th of December, 2017.

Olen Underwood, Acting Presiding Judge
Eleventh Administrative Judicial Region

Attest:

Rebecca Brite
Acting Administrative Assistant

Assignment # 182



Eleventh Administrative Judicial Region of Texas

Olen Underwood
Acting Presiding Judge
Rebecca Brite
Acting Administrative Assistant

December 28, 2017

Erin Eckhoff/Katherine Froyen Black
VIA email

Shawna Reagin
VIA email

NOTICE OF ASSIGNMENT

The Honorable Baylor Wortham, Active District Judge, 136th Judicial District Court, has been assigned to Cause No. 1412826-A; Ex Parte Juan Balderas; 179th Judicial District Court of Harris County, Texas.

Enclosure

From: Lacayo, Danny (Public Defender's Office)
To: Hutchins, Farnaz (HCDA); "136clerk@co.jefferson.tx.us"; "Baylor Wortham" (136judge@co.jefferson.tx.us)
Cc: Reagin, Shawna (HCDA); Katherine Black; Erin Eckhoff
Subject: RE:
Date: Tuesday, March 20, 2018 11:00:46 AM

Dear Judge Wortham,

I spoke with Natalie Corvington with the Office of Capital and Forensic Writs and Farnaz Hutchins of the DA's Office regarding the issue of my knowledge regarding Witness Christopher Pool. I have also attached all parties in this email. Natalie and the Office of Capital and Forensic Writs prefers that someone else from my office (Harris County Public Defender's Office) handle the representation of Witness Israel Diaz. Farnaz has no objection if another attorney from my office also handles the representation of Witness Israel Diaz. I wanted to make sure that it was okay for me to reassign the case to another attorney from the Harris County Public Defender's Office.

Sincerely,

Danny Lacayo

Assistant Public Defender – Felony Division

Harris County Public Defender's Office

Criminal Justice Center

1201 Franklin, 13th Floor

Houston, Texas 77002

Office: (713) 368-0016

Fax: (713) 368-9278

Email: Danny.Lacayo@pdo.hctx.net

<http://harriscountypublicdefender.org/>

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From: Hutchins, Farnaz (HCDA)
Sent: Monday, March 19, 2018 3:21 PM
To: Lacayo, Danny (Public Defender's Office); '136clerk@co.jefferson.tx.us'; 'Baylor Wortham'

(136judge@co.jefferson.tx.us)

Cc: Reagin, Shawna (HCDA); 'katherine.black@ocfw.texas.gov'; 'erin.eckhoff@ocfw.texas.gov'

Subject: RE:

Good afternoon,

We appreciate Mr. Lacayo bringing this to our attention and his recognition of Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct.

We do not believe there is any conflict in Mr. Lacayo continuing to represent Israel Diaz in the upcoming evidentiary hearing, as there is no correlation between Diaz and Christopher Pool. Any involvement Mr. Lacayo had in investigating Pool during his tenure as an Assistant District Attorney is unrelated to the allegations involving Diaz. Additionally, Mr. Lacayo was not previously involved in the prosecution of Juan Balderas.

If the Court believes it is best to implement new counsel, we would respectfully ask that the reassignment be swift so as to not interfere with conducting the evidentiary hearing on May 11th. Per Mr. Lacayo's email, it appears reassignment within the Public Defender's Office can be efficiently undertaken.

Sincerely,
Farnaz Hutchins

From: Lacayo, Danny (Public Defender's Office) [<mailto:Danny.Lacayo@pdo.hctx.net>]

Sent: Monday, March 19, 2018 2:01 PM

To: '136clerk@co.jefferson.tx.us'

Cc: Hutchins, Farnaz; Reagin, Shawna; 'katherine.black@ocfw.texas.gov'; 'erin.eckhoff@ocfw.texas.gov'

Subject:

Dear Judge Wortham,

My name is Danny Lacayo with the Public Defender's Office. I was assigned to represent Israel Diaz in the Writ Hearing regarding Juan Balderas. I have attached all parties involved in this email. I was reviewing the Writ and evidence attached and noticed that there was a witness named Christopher Pool who testified in the trial. The writ alleged that he provided false testimony regarding his termination in regards to an inmate death. While at the Harris County District Attorney's Office I worked in Police Integrity for a period of time. I believe that I investigated the incident regarding Detention Officer Pool. This case was eventually presented to a grand jury which returned a no bill.

I know that this is an important case to everyone and wanted full disclosure to all parties involved that I investigated one of the witnesses in this case. I am not sure if you wanted to keep me on the case and wanted your guidance. If you believe that there is some conflict I can have the case re-assigned within the Harris County Public Defender's Office.

Sincerely,

Danny Lacayo

Assistant Public Defender – Felony Division
Harris County Public Defender's Office
Criminal Justice Center
1201 Franklin, 13th Floor
Houston, Texas 77002
Office: (713) 368-0016
Fax: (713) 368-9278
Email: Danny.Lacayo@pdo.hctx.net
<http://harriscountypublicdefender.org/>

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EX PARTE, JUAN BALDERAS) IN THE DISTRICT COURT
)
)
vs.) HARRIS COUNTY, TEXAS
)
)
STATE OF TEXAS) 179TH JUDICIAL DISTRICT

WRIT HEARING

On the 22nd day of February, 2018, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Baylor Wortham, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

Ms. Faraz Hutchins
SBOT NO. 24063791
Ms. Shawna L. Reagin
SBOT NO. 16634900
Assistant District Attorney
1201 Franklin, Suite 600
Houston, TX 77002
Telephone: (713) 274-5800
Counsel for the State

Ms. Erin Eckhoff
SBOT NO. 24090910
Ms. Katherine Froyen Black
SBOT NO. 24099910
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1700 N. Congress Avenue, Suite 460
Austin, TX 78701
Telephone: (512) 463-8503
Counsel for the Defendant

P-R-O-C-E-E-D-I-N-G-S

THE COURT: So everybody ready to proceed?

MS. ECKHOFF: Yes, sir.

MS. HUTCHINS: Yes.

THE COURT: The Court will call Cause No. 1412826-A, ex-parte, Juan Balderas. I'll note for the record that Mr. Balderas is present in the courtroom this afternoon.

Counsel, since we are on the record, can I have each of the attorneys identify themselves for the court reporter and your respective clients, please.

MS. HUTCHINS: Farnaz Hutchins, spelled F-a-r-n-a-z; last name Hutchins, H-u-t-c-h-i-n-s. For the State.

MS. REAGIN: Shawna Reagin, S-h-a-w-n-a R-e-a-g-i-n for the State of Texas.

MS. ECKHOFF: Erin Eckhoff with the Office of Capital and Forensic Writs on behalf of Mr. Balderas.

MS. BLACK: Katherine Froyen Black, from the Office of Capital and Forensic Writs for Mr. Balderas, as well.

THE COURT: Well, Counselor, I know, just procedurally -- I guess we can kind of address this. We're here for, I guess, essentially a status conference is how he would probably label it. I know because we've

1 had a substitution of judges on this case, it takes some
2 time for -- obviously for myself to get a little bit
3 more familiarized with the case and also to kind of come
4 back and readdress certain issues.

5 So my goal here this afternoon isn't to
6 readdress necessarily all of the issues that were
7 covered in the prior hearing. I know that was a very
8 lengthy hearing and I was able to review the record.
9 And I think most of the statements that I think you have
10 speak for themselves.

11 So, my goal is to cover some of these
12 issues in more of a cursory manner. From the onset,
13 I'll note in the filings that each of the parties
14 submitted that it's very apparent from the record that
15 the respective attorneys in this case have worked very,
16 very hard and diligently on this, both the counsel for
17 Mr. Balderas and the counsel for the State. It's very
18 evident from the filings and the work product of the
19 attorneys that both counsel genuinely care about this
20 case. It's very important to them. So I want to
21 commend each of the attorneys for the outstanding
22 representation you've shown your respective clients from
23 the get-go.

24 And I say that, having dealt with a lot of
25 bad lawyers. It's very refreshing to actually see some

1 good lawyers that do good work on a case. I do want to
2 commend each of you for the work that you have put forth
3 into the case and are continuing to do so, thus far.

4 Getting somewhat into the crux of the
5 matter, I know, Ms. Eckhoff, you filed a request, asked
6 for a live evidentiary hearing on a litany of issues.
7 So, they're somewhat voluminous, but I'll consolidate
8 those. From the get-go, we have issues relating to
9 recanted testimony or the alleged false testimony of two
10 witnesses, Mr. Israel Diaz and Mr. Christopher Pool.
11 There's also an issue relating to Brady disclosure of
12 impeachment evidence, although I think technically that
13 would be under the category of Giglio, but I think it's
14 still under the same parameters. Multiple issues
15 relating to ineffective assistance of counsel, issues
16 pertaining to jury's exposure to outside influences.
17 And then another category, which I would, I guess, label
18 as constitutional law issues relating to jury charge and
19 voir dire and other aspects such as that.

20 So, one of the things that I noted at the
21 get-go was the dispute about whether or not there's a, I
22 guess, mandatory or obligatory right to have an
23 evidentiary hearing to develop some of these matters.
24 Having read the State's response, I think there's merit
25 in their response in that the Supreme Court case law

1 recited by counsel for Mr. Balderas was really more
2 limited in scope to issues relating to mental competency
3 or really mental ability relating to somebody being
4 medically diagnosed with an IQ below a certain
5 threshold. Here we're looking at a little bit more
6 broader issues.

7 So Ms. Eckhoff, having read the filings,
8 I don't believe that's one of the allegations that's
9 been raised in your habeas corpus is that your client is
10 below the requisite IQ in order to be death penalty
11 ineligible. Is that correct?

12 MS. ECKHOFF: That's correct. But, Your
13 Honor, I would point out that US Supreme Court precedent
14 in Evitts V. Lucey makes clear that due process applies
15 in situations where, like here, the State has
16 instituted a process, right, by creating Article 11.071
17 of the court of the Texas Rules of Criminal Procedure.
18 The State has undertaken a post conviction writ process.
19 And to the extent that the State has done that, then due
20 process applies.

21 So, I don't believe that a more limited
22 reading of Panetti and Ford is actually the case. Those
23 particular cases pertain to those issues, but they are
24 guidance on the issue of due process applying in post
25 conviction, more generally.

1 THE COURT: Okay. Well, I mean, I'll take
2 that argument certainly under consideration; but I do
3 think that although the Court has discretion, in order
4 to allow the development of evidence in certain
5 categories, if warranted under the circumstances, I
6 don't know that it necessarily equates to an absolute
7 right on any potential issues. The Court's belief is
8 that each individual issue will turn on its own
9 circumstances. So...

10 And I'll rule on that, too. I think that
11 the State was accurate in that the evidentiary hearing
12 is really a matter to be developed. Evidence after the
13 fact, as necessary, but not necessarily to be used as a
14 fishing expedition or a means to -- where evidence could
15 theoretically exist, to allow it to probe every possible
16 nook and cranny.

17 My take on it has always been that if
18 there is indication of where evidence is likely to exist
19 or issues that are certainly undisputed that need to be
20 developed, that may be the appropriate avenue. But with
21 each of that being said, let's kind of dive into the
22 weeds. Specifically, we have the first issue of the
23 recanted testimony and false testimony that was alleged
24 in the briefing.

25 We have Israel Diaz -- and having not

1 presided over the actual trial itself, I'm playing a
2 little bit of catch-up with the facts. But was Mr. Diaz
3 presented as a cooperating witness on behalf of the
4 State's case in chief?

5 MS. HUTCHINS: By "cooperating witness,"
6 Judge, you mean he was himself charged with a different
7 capital murder that was reduced to an aggravated
8 robbery. He had pled guilty to the aggravated robbery
9 and it was open for sentencing after he testified in
10 Mr. Balderas' case and I believe two other cases.
11 Ultimately, he only testified in Mr. Balderas' case. He
12 did not testify in the two other cases because they
13 ended up trying different cases that didn't involve him.

14 All of this information was made known to
15 the jury, it was put out. I believe he testified in his
16 original jumpsuit from the jail and made all of that
17 information aware to the jury and was cross-examined on
18 it, as well.

19 THE COURT: Was there, whether it be an
20 written or oral understanding, I guess, between the
21 counsel for Mr. Diaz and the district attorney's office
22 that if he had provided testimony in the case or
23 presumably had agreed to provide truthful testimony in
24 the proceedings, that that would have been taken into
25 consideration in his own case?

1 MS. HUTCHINS: Judge, I don't want to
2 misspeak. There was a formal written notice given to
3 defense counsel who tried the case from State's counsel.
4 I believe it's -- it's been filed, it's in the district
5 clerk's office. I just don't have a copy of that with
6 me today. So whatever the terms were or whatever it
7 was, was disclosed to trial counsel at the time.

8 I know that the defense has asked for
9 other writings, communications within the DA's office
10 relating to information about Mr. Diaz' plea deal. That
11 was all addressed prior to my coming on the case, I
12 believe it was in 2015. And having read the transcripts
13 and correspondence, whatever existed that wasn't
14 otherwise covered by work product privilege was already
15 turned over to the Office of Capital Writs. So there
16 shouldn't be anything that remains. As far as I know,
17 there were no promises, there was nothing.

18 THE COURT: Okay. Well, in any event, at
19 some point after the conclusion of Mr. Balderas' trial I
20 understand, Ms. Eckhoff, that that witness has since
21 indicated that a portion or -- all or at least a portion
22 of his testimony was untruthful or has since been
23 recanted?

24 MS. ECKHOFF: That is correct.

25 THE COURT: And certainly, to what extent

1 has that witness made that declaration?

2 MS. ECKHOFF: In speaking with our
3 investigator, he explained what testimony of his was
4 false and -- on two different occasions. He did not
5 sign an affidavit to that effect, citing concerns raised
6 by his attorney. However, he confirmed, when presented
7 with the affidavit, that the information in that was
8 correct. So I understand, obviously, that we do not
9 have a sworn document on that; but that is exactly the
10 reason that an evidentiary hearing is necessary here, so
11 that the witness can be subpoenaed and questioned under
12 oath and we have an opportunity to ask him about that.

13 THE COURT: Well -- and this is a question
14 I have and maybe it's just more of a practical
15 consideration. Obviously, counsel who represented
16 Mr. Diaz was instructing him not to give a sworn
17 affidavit because if he had given sworn testimony during
18 the course of the trial that he is now admitting is
19 false, then he would be admitting committing perjury,
20 which in and of itself is a crime and carries punitive
21 consequences.

22 So to the effect that even if this witness
23 was produced and were put on the stand and placed under
24 oath, do you have confidence that questions that you
25 posed about whether or not he gave false testimony would

1 result in him revoking his Fifth Amendment privilege not
2 to testify?

3 MS. ECKHOFF: I cannot tell you how he
4 would testify. I don't have any insight into that, but
5 we need the opportunity to try. We need the opportunity
6 to try and present that evidence to this Court. We need
7 that in order to satisfy Mr. Balderas' right to due
8 process.

9 THE COURT: Well, any time I think you
10 have a communication that somebody has changed their
11 testimony or has recanted their testimony -- that is, of
12 all the categories, one that certainly caught my
13 attention the most. You've talked about either
14 presenting the investigator to testify, although
15 obviously, the issue you run into there is some hearsay
16 issues.

17 The most reliable way to present that
18 evidence would be through that particular witness,
19 though that witness is not willing to testify without
20 invoking the Fifth. Rather than going through that
21 process of bringing him over here just to have a
22 five-minute hearing to have him invoke the Fifth and not
23 answer any questions, I don't know if you've had any
24 conversations with his attorney to see whether or not he
25 is willing to come and testify at a hearing about those

1 matters or if he's been advised by his attorney to
2 invoke the Fifth; but certainly I think that would be
3 something that would be somewhat helpful to know whether
4 or not it would be a fruitful endeavor to even produce
5 him as a witness.

6 MS. ECKHOFF: Yes, we have not had
7 contact. And I can't say what his attorney has told
8 him. To the extent he's still even represented, I don't
9 know even know that.

10 THE COURT: Well, I think ethically, as a
11 judge presiding over a case, if there's a possibility
12 that somebody is going to testify and possibly
13 incriminate themselves in any capacity, I think,
14 ethically I'm bound to at least admonish that witness as
15 to their constitutional rights and if they're indigent
16 or incarcerated, to appoint an attorney to represent
17 their interests.

18 MS. ECKHOFF: Sure.

19 THE COURT: I think that's another issue
20 that would need to be addressed to certainly protect
21 Mr. Diaz' rights if he's going to be possibly produced
22 at a hearing. Okay.

23 Well, let's discuss Mr. Pool. I looked
24 through the briefing and I've scanned through it several
25 times. I don't know how extensive his involvement is

1 discussed, but if you could share with me specifically
2 the scope you believe that his was false. Has he also
3 recanted his testimony?

4 MS. ECKHOFF: No, Your Honor. We -- at
5 trial, he provided testimony. He testified in the
6 punishment phase. He had been a corrections officer at
7 the Harris County Jail and was called by the State to
8 testify, I believe, about a discovery in contraband, I
9 think. And, in the course of that it came out -- in the
10 course of his testimony, he recognized that he had been
11 essentially let go from the Harris County Sheriff's
12 Office due to an incident with an inmate where the
13 inmate actually died.

14 And through the -- you know, he made
15 appeals through personnel. And it was notable because
16 the issue was not only that this incident occurred and
17 the inmate ended up dying, but that part of the reason
18 that he was let go was because he was found to have been
19 dishonest about something which is, of course,
20 significant.

21 When this case came out at trial -- at the
22 trial in cross-examination, trial counsel did not have
23 his personnel file. And he said on the stand that he
24 had been cleared of all of those charges. And that
25 actually wasn't true because a review of his personnel

1 file, including what he was relying on to say he was
2 cleared of all charges, doesn't actually clear him of
3 dishonesty and doesn't clear him of this incident where
4 the inmate died; but rather, it says that he could be
5 rehired.

6 So, like, part of his punishment was that
7 he could not be rehired by Harris County Sheriff's
8 Office. And what he got, you know, cleared of was
9 actually the punishment was reduced. He wasn't cleared
10 of being dishonest.

11 THE COURT: Okay.

12 MS. ECKHOFF: And it's a misdemeanor. So
13 proof for that is the personnel record that contradicts
14 his testimony.

15 THE COURT: Well --

16 MS. ECKHOFF: So I don't necessarily
17 actually believe testimony from him in a live hearing is
18 necessary. There are records on that.

19 THE COURT: That was going to be my next
20 question, if that can be established through the records
21 developing the testimony through cross-examination
22 probably with some very fruitful --

23 MS. ECKHOFF: Correct.

24 THE COURT: Okay. Next on the issue we
25 have the matter relating to the disclosure of the

1 impeachment information relating to a witness, I think,
2 pertaining to one of the notes. Through the attorney
3 notes or investigator notes?

4 MS. HUTCHINS: They're attorney notes,
5 Judge.

6 THE COURT: Well, my understanding is --
7 what the rule requires is whether -- they opposing
8 counsel has provided the notes themselves is typically
9 irrelevant. What the courts care about is whether or
10 not the information is conveyed, whether that be
11 conveyed via email, or orally, or whatever capacity, as
12 long as it was shared with the opposing counsel prior to
13 trial at a time when it could still be useful and
14 effective.

15 So I'm reading everyone's briefing
16 correctly. It seems that the information was conveyed
17 over to opposing counsel, at least, prior to trial, but
18 it was shortly before trial. I think it was three days.
19 Is that the allegation?

20 MS. HUTCHINS: So, Judge, we have looked
21 at it in two different ways sort of based off the
22 argument that defense is making now. According to the
23 affidavit, trial counsel, Mr. Godinich, he was aware of
24 it pretrial. There's no timeline from him. He said in
25 his review of all of the documentation from the DA's

1 office, which was over a series of years that we have
2 based off of his time sheets, he reviewed the entirety
3 of the file. These notes were amongst the things that
4 he's reviewed, he was aware of them.

5 In terms of trying to pinpoint an exact
6 timeline, I think the defense makes light of this email
7 that existed at least we know three days before
8 testimony started. At minimum, we know three days
9 before they were made aware of some meetings that
10 occurred and that's sort of, in terms of a timeline, the
11 best we can qualify. But Mr. Godinich says he was aware
12 of it well before. Prior prosecutors on the case say
13 that these notes were available in the State's file for
14 defense to review. The defense did review the State's
15 file and that was back in 2010, 2011.

16 And one thing I did want to mention to the
17 Court that we didn't include in our briefing, I came
18 across it again in preparing for this hearing, is that
19 Mr. Godinich actually in presenting Walter Benitez, I
20 believe, one of his -- his star defense witness,
21 Mr. Benitez actually testifies to some of the contents
22 of these notes and the meetings that were held several
23 days before the murder talking about what was discussed
24 at the murder and the hit being put out.

25 So I just wanted to bring that to the

1 Court's attention that they were able to make use of
2 that evidence, even if it was three days; but we
3 certainly believe it was years before.

4 MS. ECKHOFF: There's a few different
5 points I would like to address here. First of all, I
6 think the State misunderstands the significance of the
7 pretrial hearing, at least the significance to us.
8 Okay.

9 These notes that were withheld were
10 impeachment because on multiple occasions years before
11 the trial, the State's star witness against Mr. Balderas
12 gave contradictory statements. What he says in those
13 happened is not what he testified to. They're prior
14 inconsistent statements. Right? That was not revealed
15 three days before at this pretrial hearing. Right?
16 This is not what that pretrial hearing disclosed.

17 I raised that because in Mr. Godinich's
18 and Mr. Nunnery's affidavits, they make the assertion
19 that they knew about all of these things and
20 incorporated them. And what I'm telling you is that in
21 viewing trial counsel's own emails amongst the defense
22 team, it makes clear that they were unaware of these
23 meetings until three days before.

24 I fully acknowledge that they have notice
25 of that three days before, or whatever, at this pretrial

1 hearing. However, those meetings were discussed in the
2 notes. Diaz had provided that information to the State.
3 So, for State -- or for the trial counsel to be like,
4 Hey, I'm surprised to find out that this is the State's
5 theory of what happened, you know, just a few days
6 before trial, calls into question their assertion that
7 they viewed these notes before and incorporated them
8 into their preparations.

9 And further, I will also note that
10 Mr. Godinich doesn't actually say that he saw the notes.
11 His affidavit says the notes were viewed. It doesn't
12 say who viewed them or when they were viewed. And they
13 also, both trial counsel -- and Mr. Nunnery's statements
14 is even more vague. It's, I was aware that the notes
15 existed.

16 Doesn't say how or anything to give you
17 any more information than that. So I think that that
18 vagueness is a real issue. And there's a case here of
19 Harris County, ex parte Prevost where the CCA has
20 remanded on one of these writs because trial counsel's
21 affidavits were vague.

22 The other issue is in their affidavits
23 they both say that they incorporated the knowledge that
24 they gained from reviewing these notes into their
25 cross-examination of Mr. Diaz. Again, these notes

1 pertain to prior inconsistent statements that Mr. Diaz'
2 had made to the State. There are no questions on
3 cross-examination of Mr. Diaz at trial about prior
4 inconsistent statements or even prior meetings with the
5 State. So, that doesn't seem to match up with what
6 trial counsel is asserting in their affidavits.

7 And I think what we need here is the
8 opportunity to cross-examine. You know, the Supreme
9 Court says that reliability in proceedings like this is
10 best determined through the crucible of
11 cross-examination. We need to be able to ask these
12 questions and get past the vague answers and know what
13 we're actually dealing with here. And that's really all
14 we're asking for is an opportunity to confront witnesses
15 against Mr. Balderas and present evidence because we
16 haven't had that opportunity yet.

17 THE COURT: The issue that, as far as the
18 disclosure goes, in the defense counsel's affidavit they
19 stated, at least from the record it was clear, that in
20 the hearing it was laid out or made known, the
21 inconsistent statements.

22 MS. ECKHOFF: No, they said -- my
23 understanding is that the hearing was where the State
24 went in and said, This is what our theory of the case
25 is.

1 They didn't say, This is our theory of the
2 case. We are going to rely on Mr. Diaz to do it. And
3 oh, by the way, he said contradictory things to us
4 before.

5 The inconsistent statements were not an
6 issue at the previous trial hearing.

7 MS. HUTCHINS: Judge, if I may respond?

8 THE COURT: You may.

9 MS. HUTCHINS: I think we have, I guess,
10 two different frame works that we're are looking at if
11 I'm understanding correctly. So at the pretrial hearing
12 that happened, the State proffered what they were going
13 to prove through various witnesses. And one of the
14 things that they proffered was that they were going to
15 provide testimony, that there was a meeting three days
16 before the murder. And at that meeting there was a hit
17 put out on the complainant, the defendant was present at
18 that meeting; and it was just made known that that's --
19 that the hit was out.

20 When Mr. Godinich returns to the office,
21 I'm assuming, is when he writes this email. And he
22 writes the email to the defense team that says, We
23 learned some information. We learned the State's
24 case -- a part of their theory of their case and it's
25 the first time that we've heard about meetings three

1 days before and three days after the meeting.

2 I've reviewed the transcript from the
3 hearing. There was never any mention of the meeting
4 three days after. I believe Mr. Godinich made an error
5 in that regard in writing that front portion of the
6 email. And so -- and he asked the defense team for any
7 insight into this.

8 Well, when you -- and so that's the extent
9 of sort of, at least on the transcript, what was
10 revealed from the meetings that were held three days
11 before. There is a portion in the transcript where
12 Mr. Nunnery specifically asked, I believe twice, "Three
13 days before? Three days before?" Which in reviewing
14 it -- again, we are reviewing paper documents -- it
15 becomes of note because looking at the Diaz notes, the
16 Diaz notes do mention meetings. And they mention
17 meetings nine to ten months before. And they mention
18 meanings that appear to be different with no timeline,
19 but there's never specifically a three-day meeting
20 that's mentioned in the notes.

21 So that's the point that I was trying to
22 make in my written motion was that this element of
23 surprise that appears in Mr. Godinich's email is not
24 mutually exclusive from him, his having prior reviewed
25 the contents of the notes or somebody having told him

1 the notes or whatnot because that three-day number never
2 exists in the notes. In terms of the entirety of notes,
3 the entirety of the notes deal with three different
4 conversations that were had with Mr. Diaz and the
5 State's attorneys back in, I believe it was, 2007 and
6 2008.

7 And these conversations deal with a host
8 of different extraneous offenses. They jump around, the
9 names are sort of confusing as to who's participating in
10 what, what's happening where. And those are the
11 notes -- the rest of the contents of the notes are what
12 Mr. Godinich and Mr. Nunnery say they were aware of the
13 information in that note -- in those notes before trial.

14 I know defense counsel is now making a
15 distinction, Well, if they knew it, they certainly
16 didn't use it at trial. Well, that's trial strategy.
17 That's how they want to conduct their cross-examination.
18 Just because they didn't specifically cross-examine on a
19 point that Mr. Balderas now wishes they had doesn't mean
20 that they were ineffective and doesn't mean that they
21 didn't know about it, and I think that's the key issue
22 here.

23 MS. ECKHOFF: I think there's two points
24 to make to that. One is you're presuming a lot. The
25 State is presuming a lot about what Mr. Godinich's email

1 meant. This is something we should ask him, he should
2 be providing those answers. We shouldn't be basing it
3 on what the State is interpreting.

4 Second of all, and to a similar point is
5 that the State -- trial counsel may or may not have a
6 strategy. Those are things that they can testify to
7 themselves that they should be cross-examined on. It's
8 very easy in a post-conviction case for trial counsel to
9 come in and say any error was due to strategy. And
10 that's clearly not always the case because if that was
11 the case, we wouldn't have post-conviction relief. And
12 they need to be tested on what that strategy was and
13 what the thinking was and we need to be able to prove
14 whether it was or was not strategy.

15 We don't -- we should not just take their
16 assertion, or in this case the State's assertion that it
17 must have been strategy. That's just not how these
18 proceedings should work. We need the right to confront
19 these witnesses.

20 MS. HUTCHINS: Just one more thing, if I
21 may?

22 THE COURT: Please.

23 MS. HUTCHINS: Separate from this, I just
24 want to move it along. One of the cases that Counsel
25 referenced was Prevost saying that that case was out of

1 Harris County, which it was, and that it was sent back
2 because the affidavits were so vague. The affidavits in
3 Prevost were much different than the ones that were
4 filed here. And in that particular case, they were
5 sent back for additional affidavits to clarify some of
6 the points that were made, which is also certainly
7 something this Court is able to do.

8 THE COURT: I understand. And that's
9 something I've noted, as well. Ultimately, as I
10 understand it, the attorney affidavit referenced that
11 they had access to the notes and the notes were viewed
12 by somebody on the defense counsel team -- it doesn't
13 necessarily state who -- that ultimately at the time the
14 affidavits were drafted, the defense counsel was aware
15 of, I guess, the contentions of these inconsistent
16 statements and had not indicated in their affidavits, at
17 least that I saw from review of the affidavits, that
18 there was information that they were not privy to or did
19 not have access to, just from our review of the
20 affidavits. That's certainly an aspect that I will take
21 under consideration.

22 Next, let's address the matter of
23 ineffective assistance of counsel. Now, I know there
24 are at least four different caveats you've raised in
25 your petition that address ineffective assistance of

1 counsel on trial counsel and right of capacities.

2 And so first, I'll note that as a basic
3 premise under Strickland the Courts have always
4 addressed this that ineffective assistance of counsel
5 that would amount to representation that was so
6 deficient that essentially the defendant did not have an
7 attorney assisting in the trial.

8 MS. ECKHOFF: No. Your Honor, it's
9 whether or not errors were made that would cause
10 prejudice. And the prejudice is whether or not even one
11 juror would have changed their mind.

12 THE COURT: Okay. Well -- so let's kind
13 of probe these individually. And again, I note -- I say
14 that noting certainly, as you noted, with any trial
15 strategy that, you know, hindsight is always 20/20.
16 Sometimes an attorney can, you know, roll the dice
17 thinking that outcome may have one result and have a
18 different result. And in my experience, having
19 previously dealt with dozens and dozens of 22.55s and
20 doing the issues of ineffective assistance of counsel
21 this is an area that I have some experience. So we'll
22 just tackle these individually.

23 We're talking about the first issue, I
24 think, you've raised in the guilt-innocence phase to
25 address, investigate or present information on alibi

1 evidence. Essentially, I guess, you're alleging that
2 counsel didn't do enough information to investigate the
3 case prior to it being tried?

4 MS. ECKHOFF: Correct, their investigation
5 was inadequate.

6 THE COURT: Okay. And specifically, in
7 what regards?

8 MS. ECKHOFF: First of all, we know that
9 these witnesses exist. We've provided affidavits from
10 them. And the only point at which a trial counsel in a
11 capital case should not be investigating is if they have
12 a reasonable basis for not investigating. Right? And
13 there's no indication here that there was no -- there
14 was a reasonable basis for failing to investigate the
15 guilt phase aspects of this case.

16 Clearly the guilt phase, the State's case
17 against Mr. Balderas was anything but open-and-shut. I
18 mean, we have a jury that had to deliberate for more
19 than two days before, you know, finding him guilty and
20 only after, as you've already mentioned, the extraneous
21 influences on them did they come to a guilty verdict,
22 you know. And there are still serious questions about
23 whether or not Mr. Balderas committed this crime.

24 And the guilt phase could have -- trial
25 counsel could have presented, could have discovered and

1 presented alibis. And there's no indication that they
2 actually sought to investigate, talked to people.

3 I mean, if you read their affidavits they
4 make very clear that they blame any lack of
5 investigation on their part on Mr. Balderas himself, or
6 on his family and friends. And Rompilla v. Beard makes
7 very clear that that is no excuse for not investigating
8 the case.

9 THE COURT: Well, let me pose this
10 question to you: Rather than asking defense counsel to
11 come and question them about the failure to investigate
12 certain factual matters that you think would pertain to
13 guilt/innocence, why not just present evidence on those
14 particulars that you've addressed at a evidentiary
15 hearing? In other words, if you believe that there is
16 additional evidence that exists that was not reflected
17 in the record that would pertain or reflect on actual
18 innocence, why not petition the Court to bring in
19 witnesses to develop that evidence at the habeas corpus
20 level?

21 MS. ECKHOFF: That is a part of what we
22 would present at a live evidentiary hearing because it's
23 important to note that this Court is going to have to
24 make credibility determinations about witnesses. We
25 have provided affidavits from these witnesses in order

1 to support -- to meet our pleading burden in filing the
2 application.

3 And I want to make clear that -- and even
4 the State notes this in their brief -- that we are not
5 required to plead evidence with our application. We are
6 only required to allege the facts which, if proven true,
7 might result in relief. And we have met that burden
8 here and we do that by attaching affidavits. We have
9 those affidavits, we want to call those witnesses, and
10 we want you to hear them testify so you can assess
11 credibility.

12 THE COURT: And that kind of relates to my
13 original question. My main goal and my main focus that
14 certainly gets my attention is the issue of wrongful
15 convictions. And if there's evidence that was not
16 presented or was even unknown at the time that could
17 weigh on a person's conviction that would indicate that
18 the wrong -- an innocent person has been convicted of
19 this crime, or the wrong person has been convicted that
20 it comes up after the fact or is newly discovered, then
21 that a -- at any time post trial, and certainly in the
22 habeas corpus setting, that that would be an appropriate
23 time to do that.

24 So what evidence is it that you believe
25 exists that was not properly developed that needs to be

1 developed at this point? What witnesses, specifically
2 by name, do you need to call in order to develop that
3 testimony?

4 MS. ECKHOFF: The specific witnesses that
5 we've attached affidavits from are Anali Garcia --

6 THE COURT: Any witnesses that you believe
7 exists that would offer testimony that would bear on the
8 innocence of your clients.

9 MS. ECKHOFF: Right. So we have at least
10 two witnesses, Anali Garcia and -- I apologize, Octavio
11 Cortes.

12 THE COURT: And Ms. Garcia, what is her
13 relevance or relation to this case?

14 MS. ECKHOFF: She is an alibi witness.

15 THE COURT: Okay. And her testimony was
16 not presented during the original trial?

17 MS. ECKHOFF: No.

18 THE COURT: Okay. And then Ms. Cortes,
19 what is her relevance in this case?

20 MS. ECKHOFF: It's Octavio, it's a mister.

21 THE COURT: Sorry, Mr. Cortes.

22 MS. ECKHOFF: Actually, it's Ms. Garcia's
23 brother. Also an alibi witness.

24 THE COURT: Are those witnesses located
25 within the subpoena power of this court or are they

1 located in Mexico or any other location that's outside
2 of the subpoena power?

3 MS. ECKHOFF: I believe at least
4 Ms. Garcia is in Texas. And Mr. Cortes, the last that
5 we spoke to him, was within the United States. I'm not
6 sure his current location.

7 MS. HUTCHINS: May I be heard?

8 THE COURT: Ms. Hutchins, let me hear from
9 you on that aspect. Obviously, I guess the contention
10 is that the original trial counsel were aware of these
11 witnesses elected not to present their testimony at
12 trial for whatever, whether it be strategy or whether or
13 not they found that witness to be credible.

14 MS. HUTCHINS: Correct, Judge.
15 Mr. Godinich specifically identifies Ms. Garcia in his
16 affidavit and has notes from meetings with Ms. Garcia;
17 likewise, met with Iliana Cortes, who is also a sister.
18 Mr. Octavio Cortes, my understanding is, is the brother.
19 This is a family with whom the defendant's brother has a
20 child with one of the sisters. I can't remember if it's
21 Iliana or Anali. So in essence, it would be, like, his
22 in-laws.

23 The defense was aware of Ms. Garcia and
24 Ms. Cortes, met with them, specifically spoke with them
25 about the alibi defense which would be that Mr. Balderas

1 was at the house making illegal copies of CDs at the
2 time and wasn't allowed to leave when news broke out of
3 the murder. But during these meetings these witnesses
4 had very vague recollections, couldn't provide any
5 recollections, no specifics, were told that they had to
6 go meet with the defense attorney by Mr. Balderas'
7 girlfriend so they showed up not really knowing why they
8 were there.

9 And ultimately, defense counsel made the
10 decision that they did not have any either useful or
11 admissible evidence that they can present at trial and
12 chose not to. And I believe there's documentation
13 attached to Mr. Godinich's affidavit, as well as some of
14 the exhibits the defense has attached to their own writ
15 application that support this.

16 THE COURT: Okay.

17 MS. ECKHOFF: That's not entirely correct
18 because while Ms. Cortes, I do believe, was taken to
19 meet with defense counsel, Ms. Garcia did not meet with
20 defense counsel in person. In fact, she called them up
21 on her own to reach out to them. They never reached out
22 to her. And they didn't discuss, like trial counsel --
23 there's no indication that they discussed any aspect of
24 an alibi with her, they were asking her more about
25 mitigation issues of you know, What's your relationship

1 like with Mr. Balderas? And is he a nice guy, type
2 thing. They didn't broach the alibi with her. They
3 never discussed it with her.

4 THE COURT: Well, outside of these
5 particular witnesses, are there any other areas that you
6 felt that the trial attorneys failed to adequately
7 investigate which you believe or note that evidence
8 exists that needs to be established on the record?

9 MS. ECKHOFF: And to be clear, Your Honor,
10 there may be additional witnesses, additional alibi
11 witnesses beyond what we have attached. Right? There
12 were other members of the family, et cetera. However,
13 those are the affiants that we documented to meet our
14 burden.

15 Beyond that, trial counsel also didn't
16 conduct an investigation into the actual gang.
17 Obviously, this was a gang shooting. And to better
18 understand the structure of the gang and how it operated
19 in order to confront the State's depiction of how the
20 gang worked and, you know, the State said that
21 Mr. Balderas had to be the shooter for one reason or
22 another because of, like, essentially gang politics.
23 And there are witnesses who can provide insight, who
24 provided insight to support our application on how the
25 gang actually operated.

1 And had they done that, then they could
2 have actually confronted the State's depiction of how
3 this all went down. And if that were the case, they
4 could have poked holes and challenged what they were
5 telling the jury.

6 THE COURT: And who were those particular
7 witnesses that would have testified on those particular
8 matters?

9 MS. ECKHOFF: In particular, Jose Perez
10 and Walter Benitez. Now, Walter Benitez did testify as
11 a defense witness at trial; but there was more that he
12 could have provided which is detailed in the affidavit
13 attached to the application.

14 THE COURT: Okay. And Mr. Perez'
15 testimony would have been, I'm guessing, in line of what
16 Mr. Benitez would have testified to?

17 MS. ECKHOFF: Correct.

18 THE COURT: Any other areas that you feel
19 were not properly investigated but factually needed to
20 be established on the record or that would establish
21 their actual innocence or wrongful conviction?

22 MS. ECKHOFF: And to an extent, the
23 eyewitness identification, which is a different part but
24 sort of a related piece of the ineffective assistance of
25 counsel guilt claim which is that, you know, aside from

1 Mr. Diaz, the State's other key witness against
2 Mr. Balderas was an eyewitness who is testifying, you
3 know, more than nine years after the fact about her
4 memory of that night.

5 And the line-up procedures that she was
6 put through before making the identification were
7 suggestive and problematic. And her identification in
8 the first place was a problematic because initially she
9 says immediately after the fact, you know, her first
10 recollection in speaking with law enforcement is, I've
11 never seen this guy before. I didn't know who he was.

12 And then it's only more than a week later,
13 after viewing a lineup with Mr. Balderas' picture in it
14 the day before, she says, Oh, yes. That's him.

15 And that's significant because she knew
16 Mr. Balderas for up to a year before this incident
17 occurred. So, that's questionable in the first place.
18 So trial counsel investigated this eyewitness
19 identification and the circumstances surrounding it, and
20 investigated the eyewitness herself. There is evidence
21 out there that the eyewitness, Ms. Bardales, had had a
22 relationship with Mr. Diaz, who the State had also
23 brought to her a lineup with his picture in it before
24 this.

25 And she was, like, Oh, yes, I know him.

1 And she had had a prior relationship with him. And I
2 think that that is -- if these facts had been presented,
3 I think that that could have been important because I
4 think something else that's really key to this -- it's a
5 complicated case -- is that Mr. Diaz' had a motive to
6 kill this victim.

7 This victim was going to be a witness
8 against him in an aggravated robbery case. He had the
9 motive to kill, not Mr. Balderas. And if you combine
10 that with, you know, the eyewitness' prior relationship
11 with Mr. Diaz that can cast further doubt on her already
12 shaky identification.

13 And then, of course, that leads into the
14 issue of the eyewitness identification expert and how
15 that happened. And I'm happy to go into that now or we
16 can address this first and get there.

17 THE COURT: I don't think we need to dive
18 into the full fleshed-out matters of that. Again, I've
19 read the transcripts in the prior hearing; but if I
20 understand it correctly, the issue is that there was
21 identification, an eyewitness expert that was detained
22 or noticed by the defense to be used but ultimately not
23 called?

24 MS. ECKHOFF: Correct. He gave testimony
25 outside the presence of the jury because trial counsel

1 attempted to get the identification thrown out. The
2 Judge ruled that the identification was coming in, but
3 the trial counsel could present this expert to the jury.
4 This expert who provided information about, you know,
5 why the lineup procedures were suggestive and how that
6 may have impacted an identification. And trial counsel
7 just never presented this information for the jury.

8 MS. HUTCHINS: Judge, might I be heard?

9 THE COURT: Briefly, yes.

10 MS. HUTCHINS: Judge, in terms of that
11 there, in fact, was a hearing on the record with
12 Dr. Malpass, the ID expert. And after his testimony to
13 the Court and then after another defense witness,
14 Celeste Munoz testified again in another hearing outside
15 of the presence of the jury, the defense brought up with
16 the Court their concern about a particular case that
17 they had found. And they cite that in the record. It's
18 in Volume 29, Page 14.

19 And they specifically tell the Court that
20 in light of what they found and in this case they are
21 worried that it's -- that by presenting Dr. Malpass,
22 they are going to open the door. And the Court
23 specifically says, you know, I'm not familiar with that
24 case. I don't think it's going to open the door, but
25 again, I'm not familiar with that case.

1 And she's also said she's not familiar
2 with all of the different extraneous that exist. And
3 so I think it's clear at that point that the defense had
4 this excerpt, they put on the testimony for the Court,
5 they've heard how the testimony of Ms. Munoz is going to
6 go, as well as Dr. Malpass. They have this case law and
7 amongst themselves at that point made a reasonable
8 decision that they know the case better than the judge
9 and chose not to present this witness.

10 THE COURT: Ultimately, the testimony of
11 the witness was, at least, established on the record,
12 although it would be outside the presence of the jury,
13 the evidence was at least recorded on the record for
14 review. Correct?

15 MS. ECKHOFF: It's essentially, yeah, a
16 proffer.

17 THE COURT: Okay.

18 MS. ECKHOFF: And just to be clear, the
19 Court's ruling on two different occasions in this case,
20 you know, both when Dr. Malpass was present and when
21 she's speaking about when Ms. Munoz was at issue, the
22 Court's ruling was that Dr. Malpass could testify
23 without opening the door about suggestive lineup
24 procedures.

25 THE COURT: Okay. I think that kind of

1 covers the issue of evidence that was not presented
2 unless, Ms. Eckhoff, is there anything else that we have
3 not addressed that we need to cover on the issue of
4 trial counsel's failure to present certain evidence that
5 you believe related to guilt or innocence?

6 MS. ECKHOFF: No, I believe that's it.

7 THE COURT: Okay. I note there the next
8 point where you've got trial counsel's failure to
9 present certain testimony of witnesses from Mexico. And
10 my recollection from the transcripts and from the record
11 was that there had been attempts to obtain those
12 witnesses. Again, they're outside the subpoena power of
13 the Court, but they voluntarily appeared electronically
14 through Skype or some sort of other teleconference
15 network but because of technical difficulties, some of
16 the testimony was cut short. And then another witness
17 refused to testify or was unable to because of technical
18 difficulties?

19 MS. ECKHOFF: That's my understanding in
20 terms of how the actual Skype testimony went was that
21 once -- as it was being presented, there were technical
22 difficulties, I believe, on this side of things that was
23 making it incredibly difficult and it was sort of
24 abandoned.

25 And the claim is actually that trial

1 counsel didn't preserve for the record the trial Court's
2 denial of the funds. So there are some indications in
3 emails between trial counsel and the judge that he was
4 trying to get funds in order to bring these witnesses in
5 physically from Mexico to testify. And the Court
6 informs him that she's basically not going to do that
7 and to come up with some other way of doing it. And, of
8 course, eventually at the trial it doesn't work very
9 well and it all gets abandoned.

10 Because trial counsel never made that
11 request on the record and it was never denied on the
12 record, it was not an issue that could be addressed on
13 appeal. So the claim is that they were ineffective for
14 failing to preserve the denial of funds on the record.

15 THE COURT: Okay. Well -- and again, at
16 least as to the request for denial of funds, as far as
17 questioning defense counsel, it seems like that's
18 something that's not so refuted. The record will speak
19 for itself whether or not they raised an objection or
20 not. But as far as the affidavit goes, you're not
21 contending that there's any ambiguity in their responses
22 to that allegation?

23 MS. ECKHOFF: They're -- if I recall
24 correctly, I don't believe their affidavit addresses
25 their failure to make that request on the record at all.

1 THE COURT: Next we've got the trial
2 counsel's purported failure to allege the right to a
3 speedy trial. I do note that there's, I think, eight
4 years between that had passed between the date of the
5 alleged offense and then the date of trial, which is a
6 significant amount of time. Albeit, in a capital case,
7 it's not out of the ordinary to have a considerable
8 amount of time to pass, especially for defense counsel
9 to be -- have time to prepare for trial.

10 My experience, usually time is usually an
11 ally of the defense. So it's fairly seldom that I see
12 defense counsel wanting to go to trial rather quickly.
13 But on looking at the issue of prejudice, is there a
14 particular piece of evidence or a particular way that
15 you feel your client was prejudiced by not going to
16 trial sooner versus the date that the trial actually
17 commenced?

18 MS. ECKHOFF: Well, Your Honor, there was
19 a key mitigation witness who died during that time,
20 Mr. Balderas' brother. And because this case, you
21 know -- because this case involved such weak evidence
22 against Mr. Balderas in the first instance, it all
23 basically comes down to one eyewitness who has a shaky
24 identification and a codefendant who literally flips a
25 day before Mr. Balderas' trial begins, that

1 recollections -- I mean, we have an entire claim that
2 there was this alibi. Right?

3 If they had investigated and discovered
4 this alibi, like, those memories of the night eight
5 years ago would arguably be much stronger closer in
6 time. I think that all of that -- and I take your point
7 that I'm sure that it is the case that the defense would
8 usually want to wait longer to go trial, but I think
9 that that presumes that there's actually an active
10 adequate investigation happening.

11 There are long, long periods in that eight
12 years where it's wholly unclear whether any significant
13 investigation, particularly into the guilt phase of this
14 case, was ever occurring.

15 THE COURT: Okay. And then finally,
16 alleged ineffective assistance of counsel as to the jury
17 selection process talking about the topic of sexual
18 abuse during voir dire. In what capacity was that
19 particularly an issue in this case?

20 MS. ECKHOFF: Mr. Balderas himself. A key
21 piece of the mitigation that trial counsel presented at
22 trial was his own history of sexual abuse. And it was
23 definitely a key component of the mitigation that they
24 presented in his defense. And despite knowing that well
25 in advance of conducting voir dire, they didn't ask any

1 questions of potential jurors that might kind of sauce
2 out their own experiences with sexual abuse or their
3 understanding of it, those sorts of things that could
4 help them identify whether that would be a juror where
5 evidence of this type might resonate.

6 THE COURT: Well, so what was -- was the
7 issue to try and identify jurors that had been victims
8 of sexual abuse?

9 MS. ECKHOFF: It's -- no, not necessarily.
10 It's to their views, and their understanding and how
11 they might receive that evidence.

12 THE COURT: I mean, I know with voir dire
13 it's kind of not an exact art on what things you may
14 want to raise with a jury or may not want to raise with
15 a jury. Certainly, logical things that would relate in
16 a capital case would be issues relating to the death
17 penalty, issues relating to prior criminal convictions,
18 criminal history, people's belief on whether someone
19 could be rehabilitated.

20 All those things certainly would be very,
21 very relevant; although, I think that would clearly fall
22 squarely within the issue of trial strategy of someone
23 not wanting to raise the issue of sexual abuse with a
24 jury in that it could also be a double-edged sword. You
25 have people that have very strong feelings relating to

1 that topic. That may also result in jurors being -- I
2 guess, having the fans flamed on somebody they'd be more
3 inclined to convict versus one they'd be more inclined
4 to find at issue with mitigation and possibly having to
5 qualify the jurors before they've even decided guilt or
6 innocence is a bit of a challenge. But that issue, I
7 think, may be a little bit tougher issue.

8 I think generally in voir dire, appellate
9 courts have given lawyers a little bit more leeway in
10 strategy in qualifying jurors. But other than raising
11 the issue of -- the defendant's issue of people's
12 experience of sexual abuse or their own attitudes
13 towards it, or any other areas within the voir dire
14 process of the trial, you felt that the trial counsel is
15 deficient and would warrant needing to be presented as a
16 witness to be examined further at an evidentiary
17 hearing?

18 MS. ECKHOFF: I don't believe so.

19 THE COURT: We've gone about an hour and
20 my customary practice is about every hour to take about
21 at least a 10-minute break to let everybody use the
22 restroom and, more importantly, to let our court
23 reporter get a brief of rest of the hands. So why don't
24 we do that, take a 10-minute recess and then we resume
25 at 35 minutes past the hour.

1 *(Recess taken.)*

2 THE COURT: All right. We're back on the
3 record. I think we're getting towards the tail end of
4 the issues that we needed to address.

5 Ms. Eckhoff, next on my list was the issue
6 pertaining to the jury's exposure to certain outside
7 influences. And I know we'll address each of those
8 individually, but I just want to make sure that I'm
9 clear. Are you asking the Court to bring in individual
10 jurors from that trial and question them pertaining to
11 their deliberations and those influences?

12 MS. ECKHOFF: No, I don't think it's
13 necessary to question them about their deliberations.
14 And I understand that that's not even permissible under
15 606(b).

16 THE COURT: Correct.

17 MS. ECKHOFF: What I do think is important
18 is to hear how they interpreted these events. It's
19 impossible, I think, to assess whether these were
20 extraneous influences that could affect a juror. And I
21 think this is why, as we somewhat discussed at the prior
22 hearing, you know, this isn't about these specific
23 jurors and their specific decision and whether they can
24 say that this affected their decision or not.

25 The standard -- the law makes clear that

1 the question is whether or not these events would
2 basically have impacted a hypothetical juror in their
3 position. Right? I think it's important to -- well,
4 because it can't be them, specifically. It's someone
5 sitting in a situation like them. Is it possible or
6 likely that someone experiencing that would be affected
7 and have it affect their verdict?

8 What is important to hear from the jurors
9 is what they saw, how they -- what the reaction was and
10 how that felt and how it impacted them. And then you
11 can take that information to understand, okay, if
12 someone -- a hypothetical juror was feeling that, could
13 it have impacted their verdict.

14 And I think another key piece of this
15 claim is the timing of when the Court addressed this on
16 the record. That's another key piece of this claim.
17 And it's really unclear, even from all of the
18 information that has been presented in the application
19 and in the State's response to it, we still don't have
20 a clear timeline of when the Court became aware that
21 this had happened. And that's really important because
22 we have indication -- we provided an affidavit from a
23 person who was sitting in the courtroom that day, a
24 member of Mr. Balderas' family who says that the Court
25 was informed that this had occurred before the verdict

1 came back at the guilt phase.

2 And if that's the case -- and yet it
3 wasn't actually addressed on the record or acknowledged
4 until after the verdict came in and after everybody took
5 a lunch break -- that violates his rights to due
6 process. That is something that should have been
7 addressed on the record before the verdict came in. The
8 impact that that had on the jury should have been
9 assessed prior to their verdict.

10 THE COURT: And I want to make sure that
11 I'm clear on this. You're not making any contention
12 that there was any juror misconduct by a member of the
13 jury, that they had engaged in any impermissible
14 investigation or disregarded any of the Court's
15 instructions not to investigate any factual matters on
16 their own outside of the evidence presented in court?

17 MS. ECKHOFF: Well, we have the extraneous
18 influence portion of this claim and then there are
19 specific claims of juror misconduct. For example, there
20 was a juror who, in violation of the court's orders, was
21 posting about his experience sitting on the jury on
22 Facebook and had responses from his Facebook friends,
23 you know, saying, you know -- yes, Give him the chair.

24 But with regards to these extraneous
25 influences, no. There's no allegation that the jurors

1 have gone beyond, these were things that happened to
2 them.

3 THE COURT: And I've read the affidavits
4 of several of those jurors that were attached as
5 exhibits. And I do note that those affidavits tend to
6 be very detailed and descriptive. They generally tend
7 to be consistent with the issues of the location of the
8 hotel, and that several of the jurors were aware that
9 the location of the crime scene was a relatively short
10 distance from the location of the hotel. But I didn't
11 see anything in the affidavits that indicated that
12 jurors actually went to the location of the crime scene
13 or were transported by the crime scene to and from their
14 transportation from the hotel by the court during
15 sequestration.

16 MS. ECKHOFF: I think that that's correct
17 as far as I know, as well; but I think what's something
18 to keep in mind and what they noted, right, is they had
19 just sat through days of testimony about this gang and
20 where in southwest Houston it operated. And they were
21 hearing names of streets and all of this and then
22 they're passing all of these streets on their way.

23 So they know that they're being taken
24 closer and closer and being asked to stay very close to
25 where this happened within the area where the gang at

1 issue in this had operated. I think that is more than,
2 you know, seeing the crime scene itself. It's how
3 that -- how that concerned them.

4 THE COURT: Well, the concerns they had,
5 though, I mean, are those concerns not reflected in the
6 affidavits that have been tendered as exhibits?

7 MS. ECKHOFF: No, I believe that they are
8 reflected in their affidavits.

9 THE COURT: Okay. So as far as presenting
10 testimony at an evidentiary hearing, it would seem to
11 me, though, the concerns that were raised were pretty
12 well documented in their affidavits. As far as needing
13 to bring a juror into court and place him under oath and
14 ask him questions about that, it seems, though, their
15 concerns relating to the location of that hotel were
16 pretty well documented.

17 The other issue is the concerns about
18 Mr. Balderas' brother purportedly waving at the bus.
19 And I'll note it doesn't seem that he was ever located
20 by the bailiffs or whether it was every actually
21 confirmed if it was, in fact, Mr. Balderas' brother.
22 But there was a person waving that was believed to have
23 been a relative, which also was documented in the
24 affidavit, as well.

25 I'll note that the concern being, as

1 reflected by the jurors, was that some of them felt
2 somewhat frightened or that their safety was not being
3 appropriately addressed. But wouldn't you agree that if
4 the jurors are generally feeling as though in a capital
5 case involving a gang in the Houston area, that
6 generally speaking the juror issues pertaining to juror
7 intimidation have historically been towards jurors being
8 reluctant to convict because they were intimidated or
9 were afraid of consequences versus convicting because
10 them felt intimidated?

11 I mean, generally speaking, if a juror is
12 saying that they felt threatened or intimidated, usually
13 they were reluctant to convict because they're afraid of
14 repercussions coming from convicting a gang member.

15 MS. ECKHOFF: I would -- in all honesty,
16 Your Honor, this is actually the only case that I've had
17 where this has been an issue. And while I see your
18 point, I could just as easily see a juror deciding that
19 they want to punish him more because they're scared and
20 felt like -- that someone associated with them trying to
21 intimidate them. I can't presume to know how a juror is
22 going to go one way or the other.

23 THE COURT: I say that -- my background
24 traditionally has been in federal courts dealing with
25 large-scale drug trafficking cases involving the Gulf

1 cartel or the zeta that cartel where obviously there
2 were multiple instances of cartel members or gang
3 members attempting to influence either witnesses, or
4 jurors, or other ways in order to affect the outcome of
5 the case.

6 And so that's something that obviously
7 exists and is recognized in jurisprudence. It may be
8 more recognized at the federal level; but, I mean, just
9 as a practical matter of speaking one of the things that
10 jumped out at me was that if jurors felt, I guess,
11 intimidated, just logically thinking at it, wouldn't it
12 seem to be more inclined to curry to the defendant's
13 favor versus -- versus not necessarily being more
14 inclined for conviction?

15 I didn't see anybody -- anywhere in the
16 affidavits that one of the jurors indicated that they
17 were more inclined to convict because they were either
18 angry, or upset, or were aggravated because of that
19 occurrence.

20 MS. ECKHOFF: Well -- and Your Honor, I
21 would point out that that is exactly -- I believe would
22 fall under 606(b). Right? That's actually -- that
23 would be evidence of their own deliberations. And
24 that's why it isn't in their affidavit. It's not
25 admissible evidence, but I think --

1 THE COURT: Let me rephrase it. It didn't
2 seem as though the jurors indicated that they had taken
3 a hostile approach. It seems that generally the tone of
4 the affidavits were that the jurors were afraid and
5 concerned because of it, because they felt that there
6 were lapses in security and there should have been more
7 higher level of scrutiny or security that should have
8 been given to their safety by the court system and by
9 the bailiffs that were assigned to them.

10 MS. ECKHOFF: I think that's certainly a
11 key, a piece of how they felt; but I mean, they are
12 seeing this person that they understand to be a relative
13 of Mr. Balderas and they're interpreting him as trying
14 to intimidate them and create these feelings of fear.
15 There isn't -- I don't know of any evidence at this
16 point in the record one way or the other, honestly,
17 about either being more or less likely to convict based
18 on that experience. But that is clearly an experience
19 that could impact their verdict.

20 THE COURT: Okay. And then finally I have
21 what I've labeled as the kind of constitutional issues.
22 I think we can move through many of these rather quickly
23 because I don't think they're necessarily going to
24 warrant any calling of any live testimony or develop
25 anything from an evidentiary standpoint.

1 MS. ECKHOFF: Correct, they're questions
2 of law.

3 THE COURT: But I did want to cover them
4 very quickly just to make sure that I understand that we
5 are on the same page, that I'm not making any
6 assumptions on whether or not you were asking the
7 Court -- the right to present witnesses.

8 So first is whether or not the death
9 sentence is allegedly unconstitutional because of a jury
10 instruction that was requested, but not given. I think
11 specifically that a single no vote would result in a
12 life sentence. And so you've raised that as a
13 constitutional issue. I'm assuming that there's no --
14 there's no witnesses or any factual matters that you
15 feel you need to develop in order to make that argument?

16 MS. ECKHOFF: I would note that we have
17 provided affidavits from jurors that indicate that there
18 were holdouts at the punishment phase that may have, if
19 they had understood that being -- that they didn't need
20 to bring nine of their friends along with them to find
21 for LWOP, that they may have done that. And we've
22 documented that, as best we could, in the affidavits
23 that we attached to the exhibits and -- I'm sorry,
24 exhibits that we attached to the application and that
25 potentially could require some further factual

1 development, but I'm not -- I can't specifically recall
2 at this moment if there's anyone in particular.

3 THE COURT: Okay. Next, you allege that
4 the death sentence was allegedly unconstitutional
5 because it was arbitrarily and capriciously assigned
6 based upon response to Special Issue No. 1 did not
7 define key terms that were requested by defense and also
8 poorly failed to narrow the class of death eligibility
9 to defendants..

10 And again, that seems to be a
11 constitutional issue that just turns on the instruction
12 to the jury. So same thing, I take it there's no other
13 witnesses you're needing, requesting the Court to
14 subpoena or come forward for an evidentiary hearing?

15 MS. ECKHOFF: That's correct.

16 THE COURT: And then finally: The death
17 sentence is ultimately unconstitutional because the
18 punishment charged allegedly limited the evidence the
19 jury could find mitigating. Again, it's same issue
20 dealing with the jury instruction.

21 MS. ECKHOFF: Correct.

22 THE COURT: Is there any other issue
23 that's -- that I have not addressed pertaining to, I
24 guess, in the general constitutional law issue?

25 MS. ECKHOFF: No.

1 THE COURT: All right. Finally, I think
2 you had also made a request to subpoena some of the
3 prosecutors in this case or the attorneys that were
4 actually on the prosecution team. Was that, again, in
5 furtherance of trying to establish the ineffective
6 assistance of counsel claims or is that relating to
7 another capacity?

8 MS. ECKHOFF: Do you mean the defense team
9 or prosecutors?

10 THE COURT: Well, if I saw correctly from
11 your original petition, was there not a request for you
12 to subpoena some of the prosecutors on this case?

13 MS. ECKHOFF: Yes. So the prosecutors, I
14 think, would be relevant to two issues. One is the
15 false testimony claim and the other is the Brady claim.
16 The two instances were, you know, we have alleged
17 misconduct by the State. The State has provided
18 affidavits from one of the three prosecutors who
19 provided -- who conducted this trial. We have not heard
20 from the other two, including Caroline Dozier, who was
21 present at the meetings, those earlier meetings with
22 Mr. Diaz.

23 And the same thing with regards to the
24 Brady, all of the information comes from Tracy Bennett
25 and a former prosecutor. However, clearly the State was

1 represented by more than just one attorney. And I can
2 envision wanting to cross-examine the other witnesses,
3 as well, about their knowledge of these things.

4 THE COURT: Okay. Ms. Eckhoff, is there
5 any other issue that I have not covered that you feel
6 needs to be addressed? I know we have kind of covered
7 several other areas, some of those we covered very
8 quickly. But as far as requests to present testimony of
9 actual witnesses developed in furtherance of your
10 clients case, is there any other witness that you're
11 seeking the Court to be present for an evidentiary
12 hearing that we have not discussed?

13 MS. ECKHOFF: At this time, no. I believe
14 in terms of the witnesses we have discussed, that is
15 right. However, I would just make clear that if we were
16 having an evidentiary hearing, it's entirely possible
17 that additional witnesses on these same issues may
18 arise.

19 THE COURT: Sure. In the realm of
20 possibilities, I've found that just about anything is
21 possible; but we can only work with the information that
22 we have at hand. So I think I can work through these
23 kind of in succinct order.

24 MS. ECKHOFF: Your Honor, before you do
25 that, would it be possible for me to just make one point

1 that I think is relevant here and just the emphasis on
2 we need the right to cross-examine here because the
3 Supreme Court has found that the right to cross-examine
4 is a necessary component in due process in cases where
5 the stakes aren't nearly so high as they are here today
6 in cases where welfare benefits are at issue or a parole
7 revocation.

8 And this is exactly the reason that, you
9 know, they say death is different because the Supreme
10 Court dictates that we strive for a heightened standard
11 of reliability in the outcomes of those cases. And
12 there's just some, as we've already discussed, some very
13 serious questions about whether Mr. Balderas actually
14 committed this crime.

15 THE COURT: Okay. I'll duly note that.

16 Ms. Hutchins, do you have any other final
17 thoughts that you would like to make?

18 MS. HUTCHINS: Judge, just to sort of
19 follow up on Ms. Eckhoff's final argument, while
20 jurisprudence does say that death is different, the
21 statements that Ms. Eckhoff makes about the due process
22 that is entitled to a defendant, there's no case law on
23 this saying that he's entitled to that in a post
24 conviction.

25 We refer the Court back to the statute and

1 to the interpretation of the statute, 11.07.1 in the
2 post conviction setting and what precisely is due and
3 what is not due unto him.

4 Also, in terms of -- I'm trying to think
5 of the final things just said. One moment, Judge.

6 THE COURT: Take your time.

7 MS. HUTCHINS: Just trying to think of the
8 very last thing she said.

9 Oh, actual innocence. She argued that
10 there still are some very serious concerns as to his
11 actual innocence in this case. And I would just point
12 out for the court that the defendant didn't allege
13 actual innocence as a ground in his writ. He's only
14 alleged ineffective assistance of counsel. And so if
15 that is one of their concerns, then it wasn't raised as
16 a ground.

17 MS. ECKHOFF: Your Honor, he has alleged
18 serious constitutional violations that if proven to have
19 occurred would impact the verdict at the guilt phase.

20 THE COURT: Well, I think, I can probably
21 surmise by looking it all over, the established case
22 law, any time there's going to be purported evidence of
23 actual innocence, that that's always going to be
24 important evidence to be considered.

25 But let me just start by running through

1 these things very quickly. If we go through the
2 constitutional art issues, it seemly to be everybody is
3 in agreement that those are issues of law, not
4 necessarily of facts; that there's no contested issues
5 of fact that have to be resolved on that; and the issues
6 that we have discussed, we can -- can be resolved
7 basically by reviewing the applicable law and the
8 established record.

9 As to the issue of ineffective assistance
10 of counsel, the Court has reviewed the affidavits of
11 Mr. Godinich and Mr. Nunnery. The Court finds that both
12 of these affidavits are extremely detailed and have a
13 lot of specificity as to facts and many of the issues
14 that have been raised within the petition.

15 The Court does not find that these
16 affidavits are ambiguous and do properly go to the
17 merits of the issues raised in the petition. And,
18 therefore, the Court does not find that it would be
19 necessary for those attorneys to present themselves for
20 cross-examination and that the factual matters alleged
21 are adequately addressed in the affidavits.

22 As to the Brady/Giglio disclosure issue,
23 the Court notes specifically on the first page of
24 Mr. Godinich's affidavit that he reviewed specifically
25 23 pages of notes that were from the district attorney's

1 office and that the information contained within those
2 notes was used by them during the course of Mr. Diaz' --
3 in preparation for trial and was used by Mr. Nunnery
4 during the course of his cross-examination.

5 The Court also notes that the request as
6 to the presentment of jurors and their exposure to
7 outside influences, specifically as Ms. Eckhoff
8 correctly stated, any questions that go to their
9 specific deliberations and how they resolve the case are
10 not admissible under the Rules of Evidence. And to ask
11 a juror under the abstract theory of what an average
12 juror would believe would be something that I don't
13 think that the juror, any juror would be able to
14 adequately weigh upon.

15 I feel that a juror would be able to
16 testify as far as what their feelings and expectations
17 were, but to look at the issue in abstract and how a
18 theoretical juror would look at it is too speculative
19 and would simply be unfair on a juror to have to weigh
20 in upon that.

21 Again, the Court hasn't found that the
22 affidavits submitted by the jurors are very detailed,
23 actually go into areas that would otherwise be
24 inadmissible; but the Court notes that there's nothing
25 in the affidavits that necessarily warrants needing to

1 bring in any jurors for additional questioning or
2 cross-examination on the factors that they were supposed
3 to.

4 However, the issues of the recanted
5 testimony, the Court does find that there are specific
6 issues that do warrant the development of additional
7 testimony. Specifically, as to Mr. Israel Diaz, there
8 is, in fact, evidence of -- that his testimony was, in
9 fact, recanted; that Mr. Balderas be provided an
10 opportunity to explore that testimony.

11 However, the Court does not find that the
12 testimony of the investigator, Adrian De La Rosa would
13 be probative because -- given the fact it would be a
14 hearsay statement, the State would not be able to
15 properly probe or cross-examine that hearsay statement
16 based upon solely the investigator's accounts of
17 Mr. Diaz' statement.

18 So the Court will provide -- will allow
19 the applicant to subpoena Mr. Diaz. However, the Court
20 will thus find that given there are potential issues
21 relating to perjury, if Mr. Diaz does not, in fact,
22 already have counsel representing him or advising him on
23 his constitutional issues, the Court will appoint an
24 attorney to represent him for the limited purpose of
25 that hearing to instruct him accordingly.

1 Further, the Court will all allow the
2 testimony of Anali Garcia and Octavio Cortes, who were
3 also alibi witnesses whose testimony was never
4 presented. The Court does give note and give
5 consideration to the fact that trial counsel had
6 interviewed those witnesses and did not find their
7 testimony, their purported testimony to be credible and
8 did not present that evidence. As officers of the
9 Court, obviously, any attorney is precluded under the
10 Rules of Ethics from presenting any testimony they
11 believe to be untruthful or perjured.

12 However, given that there's no record of
13 what their testimony would be, it's impossible for the
14 Court to look in abstract to consider the testimony.
15 And, therefore, the Court will provide Mr. Balderas with
16 the opportunity to present that testimony and proffer
17 that here in court, which would also be subject to
18 cross-examination by the State.

19 As to Jose Perez and Walter Benitez, the
20 Court finds that defense counsel did present that
21 testimony, trial counsel presented that testimony at the
22 trial itself; and that those issues were, in fact, put
23 before the jury and the fact finder. And based upon the
24 juries' verdicts, the jury did not find that testimony
25 to be credible. Therefore, the Court will not order

1 that those witnesses be produced.

2 So in summation, the Court will conduct an
3 evidentiary hearing involving Mr. Israel Diaz, Ms. Anali
4 Garcia and Mr. Octavio Cortes.

5 Counsel, how much time do you require in
6 order to locate those witnesses and serve them with
7 process for the hearing?

8 MS. ECKHOFF: Your Honor, in light of my
9 caseload and other cases, I would anticipate -- I would
10 request six months to set the hearing.

11 MS. HUTCHINS: Judge, may I be heard?

12 THE COURT: You may.

13 MS. HUTCHINS: Judge, Article 11.07(1)
14 specifically says that if there's to be an evidentiary
15 hearing that it shall be within 30 days, or an
16 additional 30 days for good cause. So 60 days, max.

17 THE COURT: I did actually print off a
18 copy of my statute and I was about to address the time
19 aspects. Counsel, I don't know that six months is
20 necessarily going to be an appropriate timeline. I
21 understand that you do have a hefty caseload and also a
22 hefty traffic schedule, given the courts that you
23 service; but at the same time, I know that this habeas
24 proceeding has carried on very much more lengthy than
25 what normally the rules are prescribed for it for

1 obvious procedural reasons.

2 And so, one of the issues I've raised is
3 that if some of those witnesses have not been located by
4 this time, I guess, the question I would have is are
5 they ever going to be located? Even if you were given
6 six months to provide them, are there particular
7 witnesses that you do not have any means in which to
8 contact them or to serve them with a subpoena?

9 MS. ECKHOFF: No, Your Honor. One of my
10 primary concerns pertaining to the witnesses is Octavio
11 Cortes. He's in the Marines. I am not certain at this
12 point where he is stationed, so I cannot -- I don't know
13 how long it might take to bring him in.

14 And I do recognize that this case has gone
15 on for quite a long time, but I'd also want to make
16 clear that, you know, we first requested this
17 evidentiary hearing a year and a half ago and it's the
18 State who wanted to proceed on affidavits from trial
19 counsel that ended up taking a year. This delay to get
20 to this point is based on what the State has requested.

21 I'm asking for additional time in order to
22 be able to adequately prepare, in light of all of the
23 other cases that I have evidentiary hearings and other
24 cities in Texas and applications that need to be filed.

25 MS. HUTCHINS: Judge, if I may be heard?

1 THE COURT: You may.

2 MS. HUTCHINS: At this point, based on
3 what you have stated, it seems like it's three
4 witnesses: Israel Diaz, Anali Garcia, Octavio Cortes.
5 Israel Diaz, we know where he is.

6 THE COURT: Right.

7 MS. HUTCHINS: We can get him here within
8 two weeks. Anali Garcia, it seems like counsel knows
9 where she is or at least can get hands on her. And if
10 Mr. Cortes is in the Marines and is somewhere else, that
11 may be someone that we could get a written affidavit
12 from as to what his testimony would be.

13 I know defense is very busy, they have
14 other accounts all over the state that they go to. On
15 our end, we also have a caseload that we are handling.
16 And we'd just ask if it's three witnesses, that we try
17 to work something out sooner rather than pushing it off.

18 THE COURT: Do you have specific knowledge
19 that Mr. Cortes is stationed abroad or is stationed
20 somewhere outside of the intercontinental United States?

21 MS. ECKHOFF: Not to my knowledge.

22 THE COURT: Okay. Well, then this is, I
23 think, how it would be best to proceed to give everybody
24 an opportunity to do their due diligence. Until we have
25 definitive knowledge that we're not going to be able to

1 comport with timelines subscribed by the rules, then
2 we're going to try to adhere to the rules and conduct
3 the hearing within the timeframe that the rules require.

4 If there is something that you believe
5 would warrant the Court -- I'm not even certain that the
6 rules would allow me to extend those deadlines for good
7 cause; but at least I'll give you an opportunity to
8 contact those witnesses and observe in the process if
9 there's a particular witness that you cannot find or
10 cannot be there, we can explore the issues of whether to
11 submit their information, be it affidavit or
12 telephonically, or in what other capacity you can to try
13 accommodate those witnesses and their availability.

14 But I think, as we sit right now, the
15 timeframe we're looking at is -- let's see.

16 Ms. Hutchins, you said it was 20 days?

17 MS. HUTCHINS: Thirty days, Your Honor.

18 THE COURT: Thirty days. So if we're
19 looking for a timeframe within 30 days, we'll need to
20 obviously check my own calendar, as well as the calendar
21 of the 179th to see if we can find a date within that
22 timeframe in which everyone can be available, make
23 themselves available.

24 And then, in the meantime, if you have any
25 issues locating those witnesses or making those

1 witnesses available to present their testimony, we can
2 cross that bridge when we get there.

3 MS. ECKHOFF: Okay.

4 MS. HUTCHINS: Judge, in terms of
5 Mr. Diaz, is the Court going to appoint counsel,
6 assuming that he does not have counsel and is not
7 represented? Is that going to be appointed now or when
8 he gets back to Harris County or how is that going to
9 work?

10 THE COURT: I was going to appoint an
11 attorney to represent him today since I've said that he
12 is going to be subject to subpoena. And that's assuming
13 that he doesn't already have counsel.

14 If I appoint an attorney to represent him
15 and he contacts Mr. Diaz, and says, No, I already have
16 an attorney, the rules don't preclude him from having
17 multiple attorneys, but if there's another counsel that
18 represents him we'll, at least, be able to ascertain
19 that. But given the short time period, I would like to
20 give the attorney enough opportunity to meet with him,
21 discuss this issue with him, and then be able to make
22 that particular recommendation.

23 Ms. Eckhoff, if the attorney that we
24 appoint to represent Mr. Diaz indicates that he's going
25 to recommend to his counsel to invoke his Fifth

1 Amendment right not to testify, are you still going to
2 persist in wanting to bring that witness here and have
3 him invoke his Fifth Amendment on the stand? Or are
4 you -- would that affect your decision to call him as a
5 witness?

6 And I'll allow you to make a record of
7 that. If you don't, you can make a record of your
8 correspondence with his attorney if that's something
9 you'd like to do.

10 MS. ECKHOFF: At this time, Your Honor, I
11 believe we would want him on record. And I will reserve
12 the right to change my mind.

13 THE COURT: Very well.

14 MS. ECKHOFF: And I would just point out,
15 to my knowledge, he's not longer incarcerated.

16 MS. HUTCHINS: I haven't checked, I don't
17 know.

18 THE COURT: Well, if he is no longer
19 incarcerated or if he's on parole, there's typically
20 other mechanisms on how to locate that witness.

21 MS. ECKHOFF: Right.

22 THE COURT: But if he is not incarcerated,
23 I'll allow your officers an opportunity to try and find
24 him and have him served. So -- and likewise, if there's
25 counsel that's been appointed, they also would probably

1 be engaged in trying to track him down. If for some
2 reason he's not incarcerated and he is located, just
3 remember that I have appointed independent counsel to
4 represent him so please refrain from directly
5 communicating with him without, at least, notifying that
6 counsel.

7 MS. ECKHOFF: Okay.

8 THE COURT: Is there anything else we need
9 to take up while we are all here on the record?

10 MS. ECKHOFF: Your Honor, I did want to
11 raise one thing. At the last hearing the State
12 indicated that were going to turn over their capital
13 murder summary. They agreed that we were entitled to it
14 and they haven't turned it over and I would like a copy
15 of that, please.

16 MS. HUTCHINS: Not actually accurate,
17 Judge.

18 So the capital murder summary -- I'm not
19 sure if the Court is aware of what a capital murder
20 summary is in Harris County, Texas. It is --
21 essentially, it is work product. It is quintessential
22 work product. It is what the chief prosecutor in a
23 court prepares on a capital murder cases summarizing the
24 facts of the offense, as well as any aggravating
25 circumstances and mitigating circumstances, and then

1 makes a recommendation up the chain of hierarchy as to
2 what his or her recommendation is in terms of seeking
3 death or seeking life.

4 So a recommendation comes from the court
5 chief, then I believe the division chief, the bureau
6 chief, all the way up to the assistant district
7 attorney. And so, I mean that is essentially work
8 product in terms of everything, their thought process
9 and what goes into it.

10 In this case, it's become an issue as to
11 whether or not it contained certain information that may
12 be Brady. That's, I guess, what defense counsel's
13 concern is in terms of wanting to see it. There were
14 also -- the State is certainly aware of our obligation
15 under Brady to turn over anything that might tend to
16 negate his guilt or be impeachment evidence or whatnot,
17 certainly.

18 The issue in this case is while capital
19 murder summaries are work product, Spence Graham, the
20 former prosecutor in this case provided an affidavit
21 stating that it was in the State's file, not hidden away
22 from defense counsel and that defense counsel had the
23 opportunity to be able to view it.

24 THE COURT: And when you say "defense
25 counsel" you mean trial counsel?

1 MS. HUTCHINS: Trial counsel, correct.
2 Trial counsel, while the case was under Spence, had the
3 opportunity to be able to view it. Now, whether or not
4 they actually viewed it, I can't say; but it was made
5 available technically to defense counsel. Under the
6 Rules of Discovery, as I understand them, if it's
7 something that original trial counsel had or reviewed,
8 then trial counsel there on out would also have that
9 same ability.

10 I would like to assert the State's work
11 product privilege to it. I do believe it's work
12 product. I am prepared to turn over a copy to the Court
13 for the Court's in camera review so the court can make a
14 determination whether or not it needs to be turned over.
15 If you believe there's an impeachment or Brady evidence
16 in there, I have that copy for you, Because we would
17 like to assert our work product privilege and ensure
18 that we are not otherwise waiving our privilege to
19 anything else in final.

20 THE COURT: Well, I agree with you that if
21 it's internal documents that are comprised based upon
22 the prosecutor's assessment of the facts and their
23 individual opinions, it sounds like it's textbook work
24 product.

25 Now, if the rules of Brady should always

1 apply, if there's any information in that report that is
2 either exculpatory or goes to the witnesses'
3 credibility, in other words, the prosecutor says, In my
4 opinion, I don't find this witness to be truthful, or
5 they have the opinion of something going to credibility
6 that potentially could be Giglio evidence, there's
7 always a running obligation to disclose that
8 information. You don't have to disclose the report, but
9 the exculpatory or impeachment evidence would need to be
10 disclosed.

11 So I'm -- if the parties would prefer, if
12 you would like for me to view that in camera in order to
13 make that assessment, if it would give Ms. Eckhoff peace
14 of mind for me to do that, I'll be happy to do that.
15 But counsel, like I said, as an officer of the court
16 there's always the running duty and obligation to make
17 the Brady disclosures if it's discovered.

18 MS. ECKHOFF: Right, Your Honor. And I
19 understand that, but the basis for our request at this
20 point is actually many slightly different than just
21 Brady. Our original request was Brady and the original
22 response from the State was that was never turned over
23 because it was work product and we accepted that answer.
24 And it's only after Mr. Graham provided an affidavit
25 saying it was made available to trial counsel that we

1 renewed our request for that because we, as successor
2 counsel, should have access to all of the information
3 available to trial counsel. That's what -- we are
4 entitled to their file and to anything that they had
5 access to.

6 And so, whether or not it contains Brady
7 at this point is sort of immaterial because it was made
8 available to trial counsel and we should be able to view
9 it.

10 THE COURT: Well, you know, different
11 files have different requirements on open-file policies.
12 And I note that often district attorneys' offices or
13 other prosecuting authorities will have discovery that
14 exceeds the statutory and legal requirements of
15 discovery. But if -- I don't necessarily know or, I
16 guess it -- I would have to -- I'd probably have to go
17 and brief the issue to see whether or not an open file
18 policy at one time that is later amended would
19 permanently waive work product privilege for items in
20 that file for the duration of the case.

21 I don't necessarily know if that's the
22 case or not, but if the main issue or crux of reviewing
23 the particular documents is looking for exculpatory or
24 impeachment information, which would be the logical
25 purpose -- I mean, is there any other basis you would

1 have for wanting to review that, those notes or that
2 report?

3 MS. ECKHOFF: We want to have an
4 understanding of what information was available to trial
5 counsel at the time of trial.

6 THE COURT: Well, I think you could
7 probably ascertain that information from the
8 discoverable items within the file, as a whole, as far
9 as what reports and documents were in the file. But if
10 this is simply the fact of whether or not to seek the
11 death penalty and then the strengths and weaknesses and
12 mitigating issues, again, this just being a summary, I
13 think probably the easiest way to address that is
14 obviously to do an in camera inspection.

15 I mean, ultimately, as I said before, the
16 goal isn't necessarily to have a fishing expedition. If
17 there's particular information that you believe is going
18 to be relevant to this habeas proceeding or would weigh
19 mitigating evidence or undisclosed bias or undisclosed
20 impeachment evidence, I think we could ascertain that by
21 in camera review.

22 But is there a particular piece of
23 evidence that you are wanting to see if it's contained
24 within that report?

25 MS. ECKHOFF: I have no idea what might be

1 in the report because, as the State has indicated, that
2 to my knowledge this is not something that is typically
3 made available to anyone outside of their office. But
4 for whatever reason, it was made available to trial
5 counsel in this case.

6 And while I take your point that, you
7 know, we should be able to review trial counsel's file
8 to get a sense of what they knew and didn't know about
9 this case, our review of trial counsel's file in this
10 case doesn't have the notes at issue in the Brady claim.

11 So without them having come from the
12 State, we would have never known that trial counsel had
13 viewed them. It's sort of a similar situation. I can't
14 tell you what I need to see from there because I don't
15 have any idea what it contains, but I know trial counsel
16 saw it or at least had it available to them. And in
17 order to make a record of what trial counsel did or did
18 not have going into trial and how that may have affected
19 or contemplated -- affected their tragedy or their
20 claims of strategy, you know, I need to be able to
21 review what they had reviewed. That's why we go and
22 review the Diaz file in this case.

23 THE COURT: Well, we're talking about a
24 report that was based upon the prosecutor's assessment
25 of the file. It's one thing if it was a police report

1 that was produced by an investigator, or a detective, or
2 somebody that was looking at the case. If it's just a
3 prosecutor's own assessment of the file and a
4 recommendation based upon his opinions and viewing of
5 the evidence, it seems to be textbook work product.

6 I mean, do you -- is there any case law or
7 do you have any authority that would go to show that if
8 something that was work product privilege that was made
9 available in an open file policy, would forever waive
10 the right to assert work product privilege?

11 MS. ECKHOFF: Not off the top of my head,
12 but I would like an opportunity to brief it.

13 THE COURT: Well, I will do this. I will
14 conduct an inspection review of the report. And I'm
15 specifically looking for -- we've had a lengthy
16 discussion here and it's very well briefed with the
17 issues that you believe exist. And if there's anything
18 pertaining to relevant impeachment evidence, exculpatory
19 evidence or anything that would significantly weigh on
20 the issues before us that have not already been
21 identified or discussed, then we could certainly take
22 that up once we get to the evidentiary hearing.

23 If you find a case that says that the work
24 product has been waived because it's been voluntarily
25 disclosed and open file policy, then that's a legal

1 issue that would be closed in which case it would be an
2 open part of discovery.

3 MS. ECKHOFF: Okay.

4 THE COURT: So I will give you the
5 opportunity to do that and follow up with that. But
6 in the mean time, I'll accept a copy, sealed copy of the
7 exhibit and we will review that. In which case, if
8 there is pertinent information I'll notify the parties
9 accordingly.

10 MS. ECKHOFF: Thank you.

11 THE COURT: Okay. Is there anything else
12 we need to take up while we are all here on the record?

13 MS. HUTCHINS: Just to touch up on that,
14 if I may?

15 If the Court does find pertinent
16 information, obviously it will be disclosed. If the
17 Court does not find pertinent information in the capital
18 murder summary, at that point I would make a motion to
19 place it under seal with the file in this case.

20 THE COURT: I will accept it right now as
21 a sealed exhibit, but if -- in that it will be
22 maintained, confidentiality. Traditionally what I've
23 always done is if it's something that is privileged,
24 I'll return it to the submitting party because of the
25 fact that if it goes into the record as a privileged

1 item -- it's not something that typically would go into
2 the record because the privilege has been exerted.

3 But at this time it's been tendered as an
4 exhibit for in camera review, which we maintain sealed
5 in which case until the time the Court has had an
6 opportunity to review it and make a determination on the
7 issues that I've already addressed.

8 Anything else that we need to take up?

9 MS. HUTCHINS: In terms of setting a date,
10 are we going to do that today or via email?

11 THE COURT: I will probably do it via
12 email because I'll need to bring my court coordinator
13 into the loop to make sure that I can find a date where
14 I'm not already set for trial in the 136th over in
15 Beaumont. And so I'll do my best to work with
16 everyone's schedule.

17 I understand -- I take it an afternoon
18 setting is probably preferential, but if you believe
19 that you're going to need more than just half a day to
20 present evidence, then we will set it for a morning
21 hearing so you'll have adequate time to present your
22 witness and also have adequate time for
23 cross-examination.

24 MS. HUTCHINS: And will it be here in
25 Houston, Judge?

1 THE COURT: That will be, I guess, by
2 default where I'll have it unless y'all would prefer to
3 come to Beaumont. If the agreement of the parties would
4 be to go there because it's more convenient, I would be
5 happy to do that; but given that this is a -- the
6 hearing is in Harris County -- and, obviously, I know
7 there's people who have been in attendance that are
8 following this case for the convenience of Mr. Balderas.
9 I was, by default, going to have it here in Harris
10 County unless the attorneys would prefer otherwise?

11 MS. ECKHOFF: No, we appreciate that, Your
12 Honor.

13 THE COURT: If there's nothing further,
14 the Court stands adjourned.

15 *(Court adjourned for the day.)*
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1 STATE OF TEXAS

2 COUNTY OF HARRIS

3 I, Marcia E. Barnett, Official Court Reporter in and
4 for the 179th District Court of Harris, State of Texas,
5 do hereby certify that the above and foregoing contains
6 a true and correct transcription of all portions of
7 evidence and other proceedings requested in writing by
8 counsel for the parties to be included in this volume of
9 the Reporter's Record in the above-styled and numbered
10 cause, all of which occurred in open court or in
11 chambers and were reported by me.

12 I further certify that this Reporter's Record of the
13 proceedings truly and correctly reflects the exhibits,
14 if any, offered by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record is \$ 421.07 and
17 was paid/will be paid by Harris County.

18 WITNESS MY OFFICIAL HAND on this, the 5th day of
19 March, 2018.

20
21 /s/Marcia E. Barnett
22 Marcia E. Barnett, CSR
23 Texas CSR 5144
24 Deputy Court Reporter
25 179th District Court
201 Caroline
Houston, Texas 77002
Telephone: (832) 927-3735
Expiration: 12/31/2019

IN THE 179th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS

_____	)	Cause No.
EX PARTE	)	1412826-A
JUAN BALDERAS,)	
APPLICANT	)	Hearing date: May 11, 2018
)	
_____)	

[PROPOSED] ORDER

On this date, the Court considered Mr. Balderas's Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. After due consideration, Mr. Balderas's Motion is GRANTED. The State shall provide all materials identified in the Motion within the State's constructive possession to counsel for Mr. Balderas within ten days of this Order.

ORDERED AND SIGNED on this ____ day of _____,
2018.

The Honorable Baylor Wortham
Judge Presiding by Appointment
179th District Court

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing upon:

Office of the Harris County District Attorney
Attn: ADA Farnaz Hutchins

This certification is executed on April 19, 2018, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Katherine Froyen Black
Katherine Froyen Black

CAUSE NO. 1412826-A

EX PARTE

⌋

IN THE DISTRICT COURT

⌋

HARRIS COUNTY, TEXAS

JUAN BALDERAS,
Applicant

⌋

179TH JUDICIAL DISTRICT

MOTION TO QUASH SUBPOENAS
AND REQUEST FOR PROTECTIVE ORDER

COMES NOW THE STATE OF TEXAS, by and through the undersigned assistant district attorney, and moves the Court to quash six instanter subpoenas duces tecum in the above-referenced case, filed by the applicant and directed to the custodian of records for the Legal Department of the Harris County District Attorney's Office. The subpoenas seek the following:

1. "Files kept and maintained by the Harris District Attorney [sic] for any criminal case charging Israel Diaz (DOB 4/9/86) from 2003-2008, including all reports, notes, communications, witness lists, charging documents, promises/rewards/inducements, case resolution, and any reference to Eduardo Hernandez as a witness;"
2. "Trial file for the case of State v. Juan Balderas, as available to defense counsel;"
3. "Copies of any and all communications and contact between Alejandro Garcia (DOB 02/02/1989) and the District Attorney's Office, including, but not limited to emails, texts, phone messages, in-person conversations and notes and memos, phone conversations and notes/memos, etc., between 2005 and present."
4. "Police Integrity Division file regarding Christopher Scott Poole, former detention officer for Harris County Sheriff's Dept., employed as a detention officer from May 2009 – August 2012;"
5. "Copies of any and all communications and contact between Israel Diaz (DOB 04/09/1986) and the District Attorney's Office, including, but not limited to emails, texts, phone messages, in-person conversations and notes and memos, phone conversations and notes/memos, etc., between 2005 and present;" and

6. "Communications, including but not limited to emails, letters, voicemails, and any oral communications reduced to writing between employees and agents of the Harris County District Attorney and employees of the Harris County Department of Probation [sic] regarding Israel Diaz (DOB 4/9/86)."

In support of this motion to quash the subpoena, the State would respectfully show the Court the following:

I. DUPLICATIVE & OVERLY BROAD REQUEST

The applicant has made an identical request in a Motion to Compel Disclosure of Exculpatory and Impeachment Evidence, filed April 19, 2018. The availability of said information is scheduled to be addressed at a hearing set for Wednesday, May 2, 2018. Further, to the extent the applicant can be understood in his overly broad request, this same information was provided to the applicant's counsel in 2015.

II. GENERAL DISCOVERY OBJECTION

There is no general right to discovery in post-conviction habeas proceedings. Even the scope of pretrial discovery is governed by TEX. CODE CRIM. PROC. art. 39.14. Anything that is not discoverable under art. 39.14 cannot be discovered by the issuance of a court subpoena to the assistant district attorney prosecuting the case. See, e.g., *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 144 (Tex. App. -- Dallas 1987, orig. proceeding) (holding that "[w]hile Texas courts may have once possessed inherent authority to order criminal discovery, we hold that article 39.14 now defines and limits that authority," and that the legislature "intended article 39.14 to constitute a comprehensive pretrial discovery statute and that criminal discovery orders must fall within the confines of

that article's limited jurisdiction"); accord *Martin v. Darnell*, 960 S.W.2d 838, 841 (Tex. App. -- Amarillo 1997, orig. proceeding).

A subpoena may not be used to circumvent the discovery procedures set forth in art. 39.14, *supra*. *Wade v. Stephens*, 724 S.W.2d at 144. It follows that a subpoena may not be used to obtain information that is not discoverable in post-conviction proceedings, where the State's only duty of disclosure pertains to "any exculpatory, impeachment or mitigating document, item or information in the possession, custody or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." TEX. CODE CRIM. PROC. art. 39.14(h) and (k). See also, *Dickens v. Court of Appeals for the Second Supreme Judicial District*, 727 S.W.2d 542, 551 (Tex. Crim. App. 1987). The State must produce this data regardless of whether or not it is requested; therefore, a subpoena is unnecessary.

III. GENERAL WORK PRODUCT OBJECTION

To the extent the applicant's subpoenas may implicate the privileged work product of the State of Texas, the subpoena should be quashed. See TEX. CODE CRIM. PROC. art. 39.14(a) and (c) (exempting privileged materials from discovery); *State ex rel. Curry v. Walker*, 875 S.W.2d 379, 381 (Tex. 1994) (order requiring district attorney to release entire litigation file, except for certain direct communications, "too broad;" prosecutors have work product privilege); *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160 (1975) (recognizing that the role of the work product doctrine "in assuring the proper functioning of the criminal justice system is even more vital" than its more common application in civil litigation). "Work product" includes prosecution files and papers, offense and investigation

reports, worksheets and factual memoranda concerning the arrest of the defendant or investigation of the case by the State. *Franklin v. State*, 702 S.W.2d 241, 245 (Tex. App. - Houston [1st Dist.] 1985, no pet.). The applicant cannot use a subpoena to circumvent art. 39.14's express exception against discovery of the State's work product.

IV. GENERAL RELEVANCE/MATERIALITY OBJECTION

The applicant has failed to show the subpoenaed documents are in any way relevant to his own case, or that the items listed constitute impeachment, exculpatory evidence or mitigation, or that they tend to negate his guilt or would tend to reduce the punishment for the offense charged. Therefore, the State has no duty to comply with the subpoena or with the motion to compel disclosure.

V. CONCLUSION

Therefore, the State respectfully requests that the Court quash all six subpoenas issued for the Custodian of Records of the Legal Department of the Harris County District Attorney's Office and direct the applicant not to issue further subpoenas against the Harris County District Attorney's Office without express written permission of the Court.

Respectfully submitted,

/s/ Shawna L. Reagin

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Harris County District Attorney's Office
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CERTIFICATE OF SERVICE

I hereby certify service has been accomplished by e-mailing a true and correct copies of the motion and proposed order to Erin Eckhoff, Katherine Froyen Black and Natalie Corvington of the Office of Capital and Forensic Writs, on this the 30th day of April, 2018, as follows: Erin.Eckhoff@ocfw.texas.gov, KatherineBlack@ocfw.texas.gov and Natalie.Corvington@ocfw.texas.gov, as well as sending a copy to counsel for Israel Diaz, Genesis Draper, at Genesis.Draper@pdo.hctx.net.

/s/ Shawna L. Reagin
SHAWNA L. REAGIN

CAUSE NO. 1412826-A

EX PARTE

⎵

IN THE DISTRICT COURT

⎵

HARRIS COUNTY, TEXAS

JUAN BALDERAS,
Applicant

⎵

179TH JUDICIAL DISTRICT

ORDER

On this the 2nd day of May, 2018, came to be heard the State's Motion to Quash Subpoenas and Request for Protective Order, and having duly considered same, this Court GRANTS the motion.

It is hereby ORDERED that no further process be exercised against the Harris County District Attorney's Office in this cause without the express written permission of this Court.

SIGNED and ENTERED this ___ day of May, 2018.

Hon. Baylor Wortham
Judge Presiding by Assignment
179th District Court
Harris County, Texas

Cause No. 1412826-A

EX PARTE

§ IN THE 179th DISTRICT COURT

§ OF

JUAN BALDERAS

§ HARRIS COUNTY, TEXAS

MOTION TO CLARIFY THE COURT'S ORDER

THE STATE OF TEXAS, by and through its undersigned assistant district attorney, files the instant instrument requesting the Court to clarify its order relating to communications with witness Israel Diaz.

1.

During the February 22, 2018 status hearing, the Court made clear it anticipated witness Israel Diaz may invoke his Fifth Amendment rights during the May 11, 2018, evidentiary hearing. Accordingly, the Court appointed independent counsel from the Harris County Public Defender's Office to represent Diaz.

Additionally, the Court ordered the parties to obtain the express permission of Diaz’s counsel before they could talk to him. However, a review of the record indicates that this order occurred off-the-record. The on-the-record order is narrower: “please refrain from directly communicating with him without, *at least, notifying* that counsel” (1 R.R. at 68)(emphasis added). In short, “notifying” is a more permissive standard than the Court’s off-the-record order.

11.

THEREFORE, the State prays that the Court will clarify its order and require that the parties need the express permission of Diaz's counsel before they can communicate with him.

SIGNED this 30th of April, 2018

Respectfully Submitted,

/s/ Shawna L. Reagin

Shawna Reagin

Assistant District Attorney

Harris County District Attorney

1201 Franklin St.

Houston, TX 77002

713-274-5990

Reagin, shawna@dao.hctx.net

SBOT#: 16634900

CERTIFICATE OF SERVICE

I hereby certify service on opposing counsel has been effected by emailing a copy of this Motion on this the 30th day of April, 2018, as follows:

Erin.Eckhoff@ocfw.texas.gov, Katherine.Black@ocfw.texas.gov and
Natalie.Corvington@ocfw.texas.gov, as well as sending a copy to counsel for Israel Diaz,
Genesis Draper, at Genesis.Draper@pdo.hctx.net.

/s/ Shawna L. Reagin

Shawna L. Reagin

Cause No. 1412826-A

EX PARTE

§ IN THE 179th DISTRICT COURT

§ OF

JUAN BALDERAS

§ HARRIS COUNTY, TEXAS

ORDER

The Court **ORDERS** that counsel for the applicant and the State, including their representatives, may not communicate with witness Israel Diaz without the express permission of his counsel.

SIGNED this ____ of May, 2018

Hon. Baylor Wortham
Presiding Judge

**IN THE 179th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS**

_____	)	Cause No.
EX PARTE	)	1412826-A
JUAN BALDERAS,)	
APPLICANT	)	Hearing date: May 2, 2018
_____)	
)	

**RENEWED MOTION TO COMPEL DISCLOSURE OF EXCULPATORY
AND IMPEACHMENT EVIDENCE**

Juan Balderas, by and through his counsel the Office of Capital and Forensic Writs (OCFW), renews his Motion, filed April 20, 2018, seeking production of the following materials in the possession, custody, or control of the State,¹ relevant to the claims pending before this Court and with respect to which this Court has set an evidentiary hearing to commence on May 11, 2018. In support of this motion, Mr. Balderas respectfully states the following:

¹ In this motion, Mr. Balderas uses the word "State," which should be interpreted as including, but not limited to, any member of the HCDAO, Houston Police Department, Harris County Sheriff, Harris County Probation Department, and any other governmental entity involved in the investigation of the underlying offense, the prosecution of Mr. Balderas and Mr. Diaz, the incarceration of Mr. Balderas or Mr. Diaz, or the release of Mr. Diaz.

I.

RELEVANT BACKGROUND

On December 26, 2017, following a series of proceedings that resulted in the recusal of a prior judge, this case was reassigned to the Honorable Baylor Wortham for disposition of Mr. Balderas's Initial Application for Writ of Habeas Corpus Pursuant to Article 11.071 of the Texas Code of Criminal Procedure (Initial Application), and to dispose of any other business requested by the Court. *See* Exhibit A, Order of Assignment by the Presiding Judge. Judge Wortham contacted the undersigned counsel, Erin Eckhoff and Katherine Black of the OCFW, as well as counsel for the State, Farnaz Hutchins and Shawna Reagin of the Harris County District Attorney's Office (HCDAO), via email, requesting input regarding the scheduling of a "writ hearing" (later clarified to be a status hearing) in the case. Both parties responded, also via email, regarding the scheduling of a hearing, and a status hearing was set in the matter for February 22, 2018.

At the February 22 status hearing, the Court heard argument from both parties on numerous, substantive issues raised in Mr. Balderas's Initial Application. At the conclusion of the hearing, the Court determined that several of the claims for relief Mr. Balderas had raised in his Initial Application warranted additional factual development via live evidentiary hearing. One of these claims was a claim that a key witness for the State, Israel Diaz, had testified falsely against Mr. Balderas at his capital trial in 2014. The Court determined that Mr. Balderas should be provided

“an opportunity to explore” the testimony of Mr. Diaz by subpoena to an evidentiary hearing; however, the Court also found that “given there are potential issues relating to perjury,” that it was necessary to appoint Mr. Diaz an attorney “to represent him for the limited purpose of that hearing to instruct him accordingly.” *See* Exhibit B, February 22, 2018 Writ Hearing Transcript, at 60. The Court further found that Mr. Balderas should be allowed to present the testimony of Anali Garcia and Octavio Cortes, two alibi witnesses whose testimony was not presented at Mr. Balderas’s trial but who signed affidavits that Mr. Balderas filed in support of his Initial Application. *Id.* at 61.

Following the February 22, 2018 writ hearing, the Court and the parties exchanged emails regarding the scheduling of an evidentiary hearing in the case. The Court also appointed counsel for Mr. Diaz, for the limited purpose of advising him regarding constitutional (Fifth Amendment) issues.²

² Following the February 22, 2018 status hearing, the Court and the parties exchanged emails regarding the scheduling of an evidentiary hearing in the case. The Court also appointed Danny Lacayo of the Harris County Public Defender’s Office as advisory counsel for Mr. Diaz. Counsel for Mr. Balderas first became aware of Mr. Lacayo’s appointment via electronic communication from the HCDAO, when ADA Hutchins copied Mr. Balderas’s counsel on a string of electronic messages to Mr. Lacayo. On March 19, 2018, Mr. Lacayo contacted the Court and both parties via email (attached as Exhibit C). Mr. Lacayo’s email contained the following message:

My name is Danny Lacayo with the Public Defender’s Office. I was assigned to represent Israel Diaz in the Writ Hearing regarding Juan Balderas. I have attached all parties involved in this email. I was reviewing the Writ and evidence attached and noticed that there was a

On Friday, April 20, 2018, Mr. Balderas, through his counsel, filed this Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. That afternoon, the Court addressed the Motion in an email communication to both parties, attached hereto as Exhibit E. In the email, the Court requested the parties take a few days to confer with one another as well as with Mr. Diaz's appointed counsel, to see if any of the discovery requests contained within the Motion to Compel could be resolved by agreement.

On Tuesday, April 24, 2018, the parties conferred on the telephone for approximately one hour. At the conclusion of the conversation, the parties had not

witness named Christopher Pool who testified in the trial. The writ alleged that he provided false testimony regarding his termination in regards to an inmate death. While at the Harris County District Attorney's Office I worked in Police Integrity for a period of time. I believe that I investigated the incident regarding Detention Officer Pool. This case was eventually presented to a grand jury which returned a no bill. I know that this is an important case to everyone and wanted full disclosure to all parties involved that I investigated one of the witnesses in this case. I am not sure if you wanted to keep me on the case and wanted your guidance. If you believe that there is some conflict I can have the case re-assigned within the Harris County Public Defender's Office.

See Exh. C Page 2, email from Mr. Lacayo.

Mr. Lacayo subsequently arranged for the re-assignment of this appointment as counsel for Mr. Diaz within the Harris County Public Defender's Office. Mr. Diaz is currently represented by Genesis Draper.

reached agreement as to any of the 23 items in Mr. Balderas's motion, but the representatives of the Harris County District Attorney's Office did indicate to Mr. Balderas's counsel that there were some documents they might submit to the Court for *in camera* review, in response to Mr. Balderas's Motion.³

During the telephonic conference between counsel for Mr. Balderas and representatives of the Harris County District Attorney's Office, the HCDAO raised many objections to Mr. Balderas's requests. Some of the objections were that the requests were overbroad, others were that the materials responsive to the requests had already been produced, and still others were that items included in the request were inaccessible to counsel for the State.

For the reasons set forth below, Mr. Balderas, through counsel, respectfully renews his request that this Court issue an order directing the State to produce the materials listed below to counsel for Mr. Balderas.

II.

ARGUMENT AND AUTHORITIES

Mr. Balderas respectfully requests the Court order the State to disclose the following materials, all of which are relevant to specific claims pending before this

³ Subsequently, in an email correspondence to the Court and counsel for Mr. Balderas, Assistant District Attorney Farnaz Hutchins represented to the Court that she would like to provide the Court with several documents for an *in-camera* review. See Exh. D, attached.

Court in the Article 11.071 proceeding, including those that are the subject of the evidentiary hearing set to commence May 11, 2018, at which Israel Diaz—a key witness for the State who testified against Mr. Balderas at trial—is expected to testify.

Prior disclosure provided by the State has included some exculpatory material, but counsel has a good faith belief that additional exculpatory material exists and is in the possession of the State. *See* Exh. E, Affidavit of Erin Eckhoff. In light of what he has already received, and in anticipation of Mr. Diaz’s testimony at the May 11, 2018 evidentiary hearing, Mr. Balderas makes the following requests for disclosure, as such information would constitute exculpatory or impeachment evidence to which Mr. Balderas is entitled under the United States Constitution. Mr. Balderas is entitled to these materials because they should have been disclosed to him prior to his trial, and because they may contain information relevant to Mr. Balderas’s claims of prosecutorial misconduct and to Israel Diaz’s related testimony at the upcoming post-conviction evidentiary hearing. Defense counsel are entitled to all materials “favorable” to a defendant of which the State has constructive knowledge, not just self-evidently exculpatory material. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also, Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (noting that defendants are entitled to “favorable evidence known only to the police”). This duty to disclose includes any

information that could be used to impeach witnesses against Mr. Balderas. *See Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 668 (2004); *United States v. Bagley*, 473 U.S. 667 (1985) (prosecution's duty to disclose any information tending to show a witness's bias in favor of the government or against the defendant or that otherwise impeaches a witness's testimony); *Napue v. Illinois*, 360 U.S. 264 (1959) (due process violated where important witness for the State in a murder prosecution falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration, and Assistant State's Attorney did nothing to correct false testimony); *Mooney v. Holohan*, 294 U.S. 103 (1935). Withholding of such evidence violates due process if the evidence is material to either guilt or punishment, irrespective of whether the State knowingly withheld information. *Brady*, 373 U.S. at 87. According to the Supreme Court, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks*, 540 U.S. at 675-76.

The Texas discovery statute mirrors these constitutional requirements. *See* TEX. CODE CRIM. PROC. ART. 39.14(h) ("[T]he state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the

defendant or would tend to reduce the punishment for the offense charged.”). This statute also explicitly extends this requirement to materials not discovered by the State until after trial. TEX. CODE CRIM. PROC. ART. 39.14(k) (“If at any time before, during or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.”). While the underlying offense occurred before this statute was enacted, the Court of Criminal Appeals has discussed this provision in the context of a crime that occurred before the statute’s enactment, leaving open the prospect that this section applies retroactively to all offenses. *See Francis v. State*, 428 S. W. 3d 850, 856 n.12 (Tex. Crim. App. 2014).

A. The Discovery Requests, as General Matter, are Not Overbroad.

Mr. Balderas was convicted of capital murder and sentenced to death on March 14, 2014. The OCFW was appointed to represent Mr. Balderas in his state habeas corpus proceedings on March 24, 2014. As part of the OCFW’s statutorily-mandated duty to investigate all potential legal and factual claims for relief, counsel took steps to review potentially exculpatory and impeachment evidence in possession of the State and its various agents who were involved in prosecuting and investigating the case against Mr. Balderas. *See* TEX. CODE CRIM. PROC. Art. 11.071 § 3(a). These steps included having reviewed the case file made available by the

Harris County District Attorney's Office and filing Public Information Act requests with the Houston Police Department and other law enforcement agencies.

On or about August 13, 2015, when counsel for the OCFW undertook a review of the files made available by the HCDAO, it was counsel's understanding that representatives of the HCDAO set aside a portion of the contents of each box provided, explaining that certain materials were being withheld pursuant to the Texas Public Information Act. *See* Exh. D, Affidavit of Erin Eckhoff, at ¶6. Therefore, counsel for Mr. Balderas renews the discovery requests included in this Motion in good faith. Despite this fact, the State objects to almost all of Mr. Balderas's discovery requests on the grounds that they are overbroad and vague.

But, there is no way for Mr. Balderas to intuit what specific information the State or its agents possess. Rather, the requests made were as specific as possible. If Mr. Balderas already knew what material the State possessed that might tend to exculpate Mr. Balderas or impeach witnesses against him, including Mr. Diaz, to the point that he could make very specific and extremely detailed descriptions of each document he requests, presumably, he would not need to request them. This is the double-edged sword of the State's position: that Mr. Balderas cannot demand materials that he cannot describe, but he cannot describe them if he does not know what they are. Because the requests are reasonable, and based upon the good faith basis of prior representations by the State that materials were being withheld on the

basis of Public Information Act disclosure requirements (*see* Exh. D, Eckhoff Affidavit), the Motion should be granted in its entirety. The State cannot elide its duty under the United States Constitution to provide Mr. Balderas with relevant impeachment or exculpatory information simply by arguing that Mr. Balderas should be required first to name with specificity the documents or materials that are in the State's possession.

B. THE SUBMISSION OF DOCUMENTS TO THE COURT FOR IN-CAMERA REVIEW IS INSUFFICIENT

During the April 24, 2018 telephone conference, counsel for the State indicated its intention to submit certain documents that might be encompassed within some of the discovery requests in Mr. Balderas's Motion to the Court for *in camera* review. For the following reasons, *in camera* review by the Court is inadequate here as a means of fulfilling Mr. Balderas's rights (and discharging the State's duties) under *Brady* and its progeny.

While *in camera* review might, in another case, be an appropriate means of discerning whether particular documents contain *Brady* material, this case is much more complicated than the average case: the litigation spans more than a dozen years and the files are voluminous. To expect the Court—particularly in this case, where the Court has recently been asked to take over subsequent to a recusal motion—to discern whether particular documents might contain impeachment or other exculpatory material is unrealistic and runs an unacceptable risk of depriving

Mr. Balderas of important impeachment or exculpatory evidence to use in the presentation of witnesses and the cross-examination of State's witnesses at the upcoming evidentiary hearing. Counsel for Mr. Balderas are much better-suited to this task, particularly because the OCFW has represented Mr. Balderas since 2014, filed his Initial Application, and will be responsible for conducting the examinations of witnesses at the evidentiary hearing. Finally, it is worth noting that Israel Diaz, who was a key witness for the State at Mr. Balderas's capital trial and is being subpoenaed to the evidentiary hearing, has made multiple, conflicting statements over the years, making it virtually certain that any statement he has made to law enforcement or representatives of the State over the years could be used for potential impeachment, and could tend to exculpate Mr. Balderas.

For these reasons, Mr. Balderas respectfully requests that his counsel, the OCFW be allowed to review these files rather than the Court reviewing them *in camera*, as Mr. Balderas's counsel have the extensive background knowledge of his case necessary to determine whether a seemingly innocuous document, or note contained therein, is in fact significant to Mr. Balderas's habeas claims.

III.

DISCOVERY REQUESTED

In light of the State's disclosure obligations under *Brady* and its progeny, as well as the specific claims pending before this Court in the Article 11.071 proceeding, including the evidentiary hearing set to commence on May 11, 2018, counsel for Mr. Balderas respectfully request an order from this Court compelling the State to produce the following:

1. Copies of any and all Harris County jail records for **Israel Diaz** (DOB 04/09/1986), including, but not limited to all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, and gang association information.

For example, the State has in its possession at least some jail records for State's witnesses Israel Diaz and Alejandro Garcia, including audio files of their recorded jail telephone calls. *See* Exh. D, Affidavit of Erin Eckhoff, at ¶9. Indeed, the State's prior disclosure to the OCFW included photocopies of the physical discs containing those audio files. *Id.* The State has not, however, disclosed the contents of those files to the OCFW. *Id.* In fact, the State's prior disclosure appears to contain no audio or video files, even though audio and video files exist in the case file.

2. Copies of any and all communications and contact between **Israel Diaz** (DOB 04/09/1986), or his representatives, and the HCDAO, including, but not limited to: emails, text messages, phone messages, in-person conversations (notes and memos) and telephonic communications (and notes and memos) from 2004 to the present.
3. Additionally, Mr. Balderas specifically requests that any oral communications between **Israel Diaz** (DOB 04/09/1986) and the HCDAO that take place in advance of the May 11, 2018 hearing be

recorded and a copy of the recording produced to counsel for Mr. Balderas in advance of the hearing.⁴

⁴ In the Court's April 20, 2018, email to the parties, the Court indicated that it was inclined to find this request overbroad, because counsel for Mr. Balderas had not made a showing that these recordings actually would contain any exculpatory or impeachment information. But because Diaz has given contradictory statements with regard to Mr. Balderas's involvement in the murder of Eduardo "Powder" Hernandez, any statement that Diaz gives to the State in the presence of his attorney will be exculpatory. Diaz told Mr. Balderas's jury that Mr. Balderas was present at the scene of the murder and confessed to committing the shooting. He told OCFW investigator Adrián de la Rosa that he lied due to pressure from the government: that he did not see Mr. Balderas at the scene in the aftermath of the shooting and that Mr. Balderas never confessed to him. Any statement Diaz makes to prosecutors now necessarily will contradict one of those prior statements, and will, by definition, be exculpatory and, therefore, discoverable. Further, if Diaz offers an explanation to attempt to reconcile his contradictory statements, that explanation is exculpatory and discoverable. Also, if the State engages Diaz in possible explanations for the contradictory statements, those conversations are discoverable.

It is immaterial that the State will inevitably characterize the statements as non-contradictory, because the State's attempted reconciliation of a cooperating

witness's contradictory statements is not the standard for determining what is or is not exculpatory under *Brady*. If that were the case, a defendant would never be entitled to receive exculpatory evidence, because the State would always make some attempt to reconcile or explain away the contradictions. The true question is whether it is reasonable to interpret Diaz's statements as contradictory, regardless of the witness's explanation now.

Brady evidence encompasses not merely anything the prosecutor believes proves the innocence of the accused: it is in fact much broader. *Brady* material is defined as any information that (1) is relevant to punishment or guilt; and (2) is exculpatory, broadly defined, not solely evidence of innocence. It can also be evidence that may mitigate the sentence (here, death), or anything that reasonably can be used to impeach a State's witness. *Brady*, 373 U.S. at 87; *see also Bagley*, 473 U.S. at 490 ("impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule"). Therefore, if the witness's second, third, or fourth account is in any way different from any of the other accounts, even if it is *more* harmful to the defense, it must be turned over to the defense.

Further, permitting the prosecutor to interpret the statements of the witness is inadequate. The State is an advocate for its position, and will attempt to reconcile any statement made by the witness, even inadvertently (and good or bad faith of the

4. The entire HCDAO case file for **Israel Diaz** (DOB 4/09/86) including but not limited to communications with Diaz, status notes/reports, third party communications, references to the murder of Eduardo "Powder" Hernandez, and any references to cooperation with the State in the following cases: *State v. Juan Balderas* (Cause No. 1050630); *State v. Efrain Lopez* (Cause No. 10500629 or Cause No. 1305940 or Cause No. 1428270); *State v. Jose Hernandez* (Cause No. 1050633).
5. Files kept and maintained by the Harris County District Attorney for any criminal case charging **Israel Diaz** (DOB 04/09/86) from 2003-2008, including all reports, notes, communications, witness lists, charging documents, promises/rewards/inducements, case resolution, and any reference to Eduardo Hernandez as a witness.
6. Communications, including but not limited to, emails, letters, voicemails, and any oral communications reduced to writing between employees and agents of the HCDAO and employees of the Harris County Department of Probation regarding **Israel Diaz** (DOB 04/09/86).
7. The entire Harris County Department of Probation case file for **Israel Diaz** (DOB 4/09/86) including but not limited to communications with Diaz, status notes/reports, third party communications, references to the murder of Eduardo "Powder" Hernandez, and any

prosecution is immaterial under *Brady*, see *Brady*, at 87). The only reliable way to insure that any statement made by Diaz will be preserved, verbatim, without interpretation or omission by the prosecutor, intentional or inadvertent, is to require the statement be recorded. This procedure would also protect against any attorney or State agent becoming a witness. A recording of the statement, especially under these circumstances, is therefore the most reliable means of assuring that the statement is accurately preserved.

references to cooperation with the State in the following cases: *State v. Juan Balderas* (Cause No. 1050630); *State v. Efrain Lopez* (Cause Nos. 1050629, or 1305940, or 1428270); *State v. Jose Hernandez* (Cause No 1050633).

8. All agents' (federal, state, local and administrative agency) rough notes of interrogations or debriefings of **Israel Diaz** (DOB 04/09/86).
9. All prior written, recorded, or oral statements of **Israel Diaz** (DOB 04/09/86) relating to this case that were made to anyone, and all law enforcement agents' rough draft notes of interviews with Diaz.
10. The prior arrest and conviction records of **Israel Diaz** (DOB 04/09/86), including his complete criminal history, and the docket number and jurisdiction of all prior and pending cases.
11. All evidence that **Israel Diaz** (DOB 04/09/86) has ever (a) made any false statement to the authorities, whether or not under oath or under penalty of perjury, and/or (b) does not have a good reputation in the community for honesty. TEXAS RULE OF EVIDENCE 608(a).
12. All evidence that **Israel Diaz** (DOB 04/09/86) has ever made a false, contradictory, or inconsistent statement with regard to this case, or any statement showing bias or a motive to fabricate. *Pennsylvania v. Ritchie*, 480 U.S. 9 (1987).
13. All evidence that the statements of **Israel Diaz** (DOB 04/09/86) are inconsistent with or contradicted by that of any other person or prospective witness. *Kyles*, 514 U. 419.
14. Any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between **Israel Diaz** (DOB 04/09/86) and law enforcement or prosecutorial agent or agency (federal, state, and local). This request includes any explicit or implicit understanding relating to criminal or civil income tax liability, and/or immigration proceedings. *Kyles*, 514 U.S. at 432-34.
15. All evidence of discussion about, or *advice* concerning, any contemplated prosecution of **Israel Diaz** (DOB 04/09/86), or any possible plea bargain, even if no bargain was made, or the advice not followed. *Brown v. Dugger*, 831 F.2d 1547, 1555-56 (11th Cir. 1987)

(Clark, J., concurring) (evidence that witness sought plea bargain is to be disclosed, even if no deal struck); *Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985).

16. Copies of any and all jail records for **Alejandro Garcia** (DOB 02/02/1989), a testifying witness against Mr. Balderas at the punishment phase of Mr. Balderas's trial, including, but not limited to, all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, gang association information, jobs, classes, trainings, and commissary.
17. Copies of any and all communications and contact between **Alejandro Garcia** (DOB 02/02/1989) and the Harris County District Attorney's Office, including, but not limited to, emails, texts, phone messages, in-person conversations and notes and memos, phone conversations and notes/memos, etc., between 2005 and present.
18. Copies of any and all jail records for **Edgar Rene Ferrufino** (DOB 05/10/1988), including but not limited to all records and logs of visits, jail mail, complaints, grievances, write-ups, disciplinary records, classification worksheets, movement logs, gang association information, jobs, classes, trainings, and commissary.
19. The Police Integrity Division file regarding **Christopher Scott Pool**, a former detention officer for Harris County Sheriff's Department, who was employed as a detention officer from May 2009 to August 2012, and who testified for the State in Mr. Balderas's trial.
20. The entire Internal Affairs Department investigation file regarding **Christopher Scott Pool**, a former detention officer for the Harris County Sheriff's Office, employed from May 2009 to August 2012, who testified for the State at Mr. Balderas's trial.
21. Copies of any and all records in the Permanent File of Israel Diaz **Israel Diaz** (DOB 04/09/86); TDCJ No. 1970763), including, but not limited to, medical and mental health screenings; IQ and educational testing; reports and decisions by and to the Classification Committee; visitation logs, disciplinary records, and all parole and probation records and documents.

22. All parole and probation records and documents related to **Israel Diaz** (DOB 04/09/86), including, but not limited to, medical and mental health screenings, initial interviews, reports, and decisions for incarcerations from 2003 to the present.
23. The entire trial file for the case of *State v. Juan Balderas*, as made available to Mr. Balderas's trial counsel.

IV.
PRAYER

WHEREFORE, for the foregoing reasons, Mr. Balderas respectfully requests that this Court direct the State to disclose the above-listed information to counsel for Mr. Balderas (the OCFW).

Respectfully submitted,
/s/ Katherine Froyen Black
KATHERINE FROYEN BLACK

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Attorneys for Mr. Balderas

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing upon:

Office of the Harris County District Attorney
Attn: ADA Farnaz Hutchins

This certification is executed on May 1, 2018, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Katherine Froyen Black

Katherine Froyen Black

**IN THE 179th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS**

_____	)	Cause No.
EX PARTE	)	1412826-A
JUAN BALDERAS,)	
APPLICANT	)	Hearing date: May 11, 2018
_____)	
)	

**MOTION TO COMPEL DISCLOSURE OF CAPITAL MURDER
SUMMARY**

Juan Balderas, by and through his counsel, the Office of Capital and Forensic Writs (OCFW), files this motion seeking production of the capital murder summary in the aforementioned case. This Court has set an evidentiary hearing to commence on May 11, 2018, and Mr. Balderas requests this Court order the State to disclose the capital murder summary to counsel for Mr. Balderas in advance of the May 11 evidentiary hearing. In support of this motion, Mr. Balderas respectfully states the following:

I.

RELEVANT BACKGROUND

In October 2015, at a hearing on a prior discovery motion, counsel for Mr. Balderas requested the capital murder summary be disclosed, and the request was denied. *See* Exhibit A, Transcript of October 27, 2015 Hearing at 17. In response,

the State baldly asserted that the documents were protected under the work product doctrine. *Id.* On that basis, the Court denied Mr. Balderas's request. *Id.*

On July 18, 2016, the State filed its Answer to Mr. Balderas's Initial Application for Writ of Habeas Corpus. In support of its Answer, the State attached a sworn statement from former Harris County Assistant District Attorney Spence Graham. *See Exhibit B, Spence Graham's Affidavit*, filed with the State's Answer on July 18, 2016. Therein, Mr. Graham stated: "Also included in the State's file was the capital murder summary that I prepared which was also *available for trial counsel to review.*" *Id.* at p. 2 (emphasis added).

In light of the State's changed position on the work product status of the capital murder summary, Mr. Balderas, through his counsel, renewed his request for disclosure of the capital murder summary at a status hearing on August 17, 2017. *Exhibit C, August 17, 2017 Writ Hearing Transcript*, at 18. Indeed, in response to Mr. Balderas's request, the State adhered to the position that the documents had been disclosed to trial counsel, consistent with the affidavit of Spence Graham. Specifically, when counsel for Mr. Balderas requested to be able to see the capital case summary, the State responded: "That's probably fair." *Id.* The Court then decided: "If they have it, if they can find it, that will be fine. I'm sure you should be allowed to see it." *Id.* The State did not, however, disclose the capital murder summary to Mr. Balderas's counsel.

At the writ (status) hearing before this Court on February 22, 2018, Mr. Balderas's counsel again requested on the record that a copy of the capital murder summary be disclosed. Despite its earlier representation that it was "probably fair" that the capital murder summary be disclosed to Mr. Balderas's counsel, the State reversed course and again retroactively asserted that the document did not need to be disclosed based upon the work product doctrine. *Id.* at 68-69. Counsel for Mr. Balderas objected to the State's re-assertion of work product protection on the ground that the protection had been waived due to the fact that the former prosecutor in the case, Spence Graham, had disclosed the capital murder summary to Mr. Balderas's trial counsel prior to Mr. Balderas's trial. *See* Exh. B. This Court declined to order the disclosure of the capital case summary on the basis of the State's assertion that it was work product, but agreed to perform an *in camera* review of the document.

II. ARGUMENT

Mr. Balderas requests that this Court order the disclosure of the capital murder summary that was submitted to the Court for its review to Mr. Balderas's counsel, because the State waived the work product protection with respect to this document when it voluntarily disclosed the document to Mr. Balderas's trial counsel. *See* TEX. R. OF EVID. 511(1) ("A person upon whom these rules confer a privilege

against disclosure waives the privilege if: the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged”); *Wright v. State*, 374 S.W.3d 564, 580 [Tex.App.—Houston [14th Dist.] 2001, pet. ref’d] (if a person holding a privilege against disclosure voluntarily discloses or consents to disclosure of any significant part of the privileged matter, that person waives any privilege unless the disclosure itself is privileged); *Jones v. State*, 181 S.W.3d 875, 878 [(Tex. App.—Dallas 2005 pet. ref’d] (finding a waiver of privileged material when a defendant voluntarily disclosed the existence of a second statement to counsel in response to a prosecutor’s cross-examination of the defendant with the defendant’s initial statement to police). Waiver of privileged material may be inferred from the totality of the circumstances and reasonable inferences. See *Carmona v. State*, 941 S.W.2d 949, 954 (Tex.Crim.App. 1992).

Here, the State has repeatedly represented, before this Court and through a sworn statement of its own witness, that the State voluntarily disclosed the capital murder summary to its adversary in advance of Mr. Balderas’s 2014 trial. Specifically, by its own affirmative representation, the State placed the capital murder summary in the trial file made available to Mr. Balderas’s trial counsel, who unquestionably constitute a “third party” as contemplated in Texas Rule of Evidence 511(1). Because the State knowingly and intentionally released the information to

a third party, the State waived any work product protection that may have applied to the capital murder summary and cannot now reassert that protection.

In consideration of these points and authorities, and in light of the State's voluntary waiver of work product protection here, Mr. Balderas respectfully requests that this Court order the State to disclose the capital murder summary to Mr. Balderas's counsel. If this Court denies Mr. Balderas's request and declines to order the State disclose the capital murder summary directly to Mr. Balderas's counsel, Mr. Balderas respectfully requests this Court make the capital murder summary, under seal, a part of the record in this case so that Mr. Balderas's objections to the Court's rulings with respect to the capital murder summary can be reviewed.

III.

PRAYER

WHEREFORE, for the foregoing reasons, Mr. Balderas respectfully requests that this Court direct the State to disclose the capital murder summary to counsel for Mr. Balderas (the OCFW).

Respectfully submitted,
/s/ Katherine Froyen Black
KATHERINE FROYEN BLACK
BENJAMIN B. WOLFF, Director (No. 24091608)
(Benjamin.Wolff@ocfw.texas.gov)
ERIN M. ECKHOFF (No. 24090910)
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Office of Capital and Forensic Writs
1700 N. Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600
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Attorneys for Mr. Balderas

**IN THE 179th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS**

EX PARTE	)	Cause No.
JUAN BALDERAS,	)	1412826-A
APPLICANT	)	Hearing date: May 11, 2018
)	
)	

[PROPOSED] ORDER

On this date, the Court considered Mr. Balderas's Motion to Compel Disclosure of Capital Murder Summary. After due consideration, Mr. Balderas's Motion is GRANTED. The State shall provide a copy of the capital murder summary to counsel for Mr. Balderas in advance of the May 11, 2018 evidentiary hearing.

ORDERED AND SIGNED on this ____ day of _____,
2018.

The Honorable Baylor Wortham
Judge Presiding by Appointment
179th District Court

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing upon:

Office of the Harris County District Attorney
Attn: ADA Farnaz Hutchins

This certification is executed on May 1, 2018, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Katherine Froyen Black
Katherine Froyen Black

EX PARTE) IN THE DISTRICT COURT OF
)
) HARRIS COUNTY, TEXAS
)
JUAN BALDERAS) 179TH JUDICIAL DISTRICT

On the 27th day of October, 2015, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Kristin M. Guiney, Judge Presiding, held in Houston, Harris County, Texas.

Renee Reagan, Texas CSR No. 7573
Official Court Reporter, 179th District Court
1201 Franklin
Houston, Texas 77002

APPEARANCES

Ms. Lynn Hardaway
SBOT No. 08948520
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin
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Attorney for the State of Texas

* * * * *

Mr. Derek VerHagen
SBOT No. 24090535
Office of Capital Writs
1700 N. Congress Ave., Suite 460
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Telephone: 214.335.2668
Attorneys for the Defendant

1 THE COURT: In Ex Parte Juan Balderas,
2 the Office of Capital and Forensic Writs has filed a
3 motion for disclosure of exculpatory and impeachment
4 evidence. We've had a setting here. The State had
5 argument or wished to give the Court guidance as to what
6 they believe the appropriate resolution of this
7 particular motion was.

8 State, you may proceed. Oh, sorry. It's
9 defense's motion. My apologies.

10 MR. VERHAGEN: Derek VerHagen on behalf
11 of the Office of Capital and Forensic Writs. Yes, we're
12 requesting any exculpatory or impeachment evidence that
13 may be in the State's possession under *Brady v. Maryland*
14 and its progeny. To this point, we've already taken
15 steps to locate that information by filing our own
16 P.I.A. requests at various agencies, reviewing the D.A.
17 files: I reviewed five of the boxes in mid-August and
18 then received the other six boxes or files on
19 October 21st and have done our best to get through those
20 at this point. And then obviously, we've conducted our
21 own investigation. So based on the discovery we've been
22 provided at this point in the investigation that we've
23 conducted, we have a good faith belief that there's
24 additional information that may fall under *Brady v.*
25 *Maryland* and we're asking this Court to order that the

1 State provide that to the O.C.F.W. to the extent that it
2 exists.

3 I can go into detail if you'd like, Your
4 Honor, on what exactly we're asking for; but it's listed
5 in the motion itself. There are two things that aren't
6 listed in the motion that I wanted to talk about very
7 briefly. The first is, if you'll look at what's listed
8 as No. 3 on page 5 of the motion: Any information or
9 documentation of communications including e-mails
10 between the State and witnesses or their representatives
11 including but not limited to -- to that list, I'd like
12 to add Edgar Ferrufino, the last name,
13 F-E-R-R-U-F-I-N-O. Mr. Ferrufino was in the apartment
14 on the night of the shooting; he was an eyewitness'
15 boyfriend.

16 THE COURT: I'm sorry. Can you spell his
17 last name again?

18 MR. VERHAGEN: F-E-R-R-U-F-I-N-O. And he
19 was in the apartment on the night of the shooting. He
20 was the eyewitness' boyfriend and he ended up testifying
21 at trial also.

22 In addition to that, the O.C.F.W. is
23 requesting a capital murder summary, to the extent that
24 there was one, explaining the reason for charging
25 capitally in this case. And again, I can speak in more

1 detail about any of the other things that are listed if
2 Your Honor needs --

3 THE COURT: Capital murder summary would
4 be, then, Request No. 10?

5 MR. VERHAGEN: Yes.

6 THE COURT: Okay. Anything else?

7 MR. VERHAGEN: Nothing else.

8 THE COURT: State.

9 MS. HARDAWAY: Your Honor, Mr. VerHagen,
10 he did touch on the P.I.A. request and I would just like
11 to elaborate on that a little more. We actually did
12 something a little bit different in this case in that --
13 it's 11 boxes. We have it all divided up and there's,
14 like -- in each box there's a separate folder with
15 office work product, prosecutor work product. But
16 anyway, what our office did is we went ahead and scanned
17 in the entire contents of the 11 boxes and we have made
18 available -- at least we did all the documentary items
19 in the boxes and we recently sent disks with the copies
20 of all the documentary items to the Office of Capital
21 and Forensic Writs minus the office work product. So
22 we've already turned over a lot of information to the
23 Office of Capital Writs.

24 The other thing I'd like to say is it's
25 the State's position that this request is overly broad.

1 There isn't discovery in habeas proceedings and as a
2 matter of fact, this proceeding is not covered by the
3 Michael Morton Act which, because this was an offense in
4 2005, there's specifically a savings clause in the
5 Michael Morton Act. But, Your Honor, I would -- because
6 there is already a P.I.A. request in place in this case,
7 I've told Mr. VerHagen that I would be willing to do an
8 e-mail search for specific items; some of those -- I
9 mean, I would like to narrow the items in this
10 discovery -- in this motion but I will go ahead and do a
11 search and turn over external e-mails. I will not agree
12 to turn over internal e-mails amongst the prosecutors
13 and the prosecutors' investigators and I also object to
14 turning over the capital murder summary.

15 THE COURT: Okay. And so I'm clear, you
16 said that you've scanned -- the office, your office, has
17 scanned all of the 11 boxes --

18 MS. HARDAWAY: The documentary --

19 THE COURT: What is a nondocumentary
20 item?

21 MS. HARDAWAY: There's various types of
22 media; like, there are interviews and things like that,
23 pictures. I think there are actually some pictures that
24 have been scanned in. I'm not sure about all of them,
25 but there are a lot of CDs.

1 THE COURT: All right. So in terms of
2 the list, if we could just go down the list of the
3 defense -- I mean, the O.C.W.'s.

4 Would the State have any objection to the
5 granting of Request No. 1, any information tending to
6 show a witness' bias in favor of the Government or
7 against Balderas, or which otherwise impeaches a
8 witness' testimony?

9 MS. HARDAWAY: Well, I mean -- okay.
10 Your Honor, I was actually skipping over to No. 1 on
11 page 4, because generally these are just so general. I
12 think that all falls under the -- on page 2, the Office
13 of Capital Writs refers to disclosing any potential
14 exculpatory and impeachment information. Just because
15 something might potentially be exculpatory or
16 impeachment doesn't mean that you have to turn it over.

17 THE COURT: Say that again.

18 MS. HARDAWAY: Just because something is
19 potentially exculpatory, I don't believe that that
20 means --

21 THE COURT: Okay. Actually I meant to
22 start with the list as it begins on page 4.

23 MS. HARDAWAY: Okay.

24 THE COURT: So, any information or
25 documentation in possession of the State regarding the

1 State's plea deal with Israel Diaz, including any
2 information about his testimony, failure to testify.

3 I'm sorry. It's very early in the
4 morning.

5 So I guess the State's general objection
6 to all of these specific requests, the specific requests
7 beginning on page 4 is the P.I.A. request covers it,
8 you've scanned it --

9 MS. HARDAWAY: We've scanned everything.

10 THE COURT: Your documentary -- let me
11 read these specifics again.

12 MS. HARDAWAY: Your Honor, what I can do
13 is -- you know Traci Bennett's in trial right now,
14 correct?

15 THE COURT: No.

16 MS. HARDAWAY: Or I don't know if you
17 know; she's in a capital right now. I'm aware of my
18 duty to turn over *Brady* material and I know that Traci's
19 aware of that, too. When she gets out of trial, if you
20 want me to, I can have her look through the work product
21 and see what might be responsive to No. 1, if anything.

22 THE COURT: Okay. And for scheduling
23 purposes, just so Mr. VerHagen knows, is it a death case
24 or nondeath case?

25 MS. HARDAWAY: It's a death case. She

1 should be done in about three weeks.

2 THE COURT: Okay.

3 MS. HARDAWAY: But actually -- and you
4 probably remember this, Your Honor -- the plea deal with
5 him was pretty well explored at trial. It's when he
6 testified on direct; and also, Traci did a notice to the
7 defense --

8 MR. VERHAGEN: It's one of the
9 interesting things about No. 1 and why we continue to
10 ask for it even after the P.I.A. request has been
11 fulfilled by them is that Mr. Diaz -- if you look at the
12 Brady notice, it's agreed to that he'll testify in three
13 trials in exchange for his deal and he testifies in
14 Mr. Balderas' trial and then doesn't testify in any
15 other trials. To the extent that there's any
16 explanation why Mr. Diaz didn't testify in any of the
17 other trials and it has anything to do with the
18 truthfulness of the testimony he gave in Mr. Balderas'
19 trial, we would be requesting any information that would
20 reflect that.

21 THE COURT: To that specific request,
22 does the State have --

23 MS. HARDAWAY: You know what, Your Honor?
24 I don't know why he didn't testify in the other trials.
25 I can --

1 THE COURT: Because in the other trials,
2 they didn't try that same case. That's why. That would
3 be my guess. I'm certainly not speaking for the State.
4 That's my recollection of the facts.

5 MR. VERHAGEN: Possibly, yeah.

6 THE COURT: Juan Balderas' guilt case was
7 a different guilt case from the other cases that were
8 tried. Obviously the State has a continuing duty to
9 give you any information regarding Mr. Diaz, so I think
10 the current case law on habeas proceedings covers that.

11 With regard to Request No. 3, which
12 you've added to -- that was where you added Edgar
13 Ferrufino.

14 MR. VERHAGEN: Yes.

15 THE COURT: And Ms. Hardaway has
16 indicated that she will begin an e-mail search for those
17 as long as they are not e-mails or correspondence that
18 would normally come under the work product protection.

19 MS. HARDAWAY: I will do that. And, Your
20 Honor, okay, the one problem I had with No. 3 is, again,
21 this is pretty wide open. It says: Including but not
22 limited to Israel Diaz and Alejondro Garcia. If we can
23 narrow it just to those individuals, Diaz, Garcia, and
24 Ferrufino, I will do an e-mail search and see if I come
25 up with anything on those individuals.

1 THE COURT: Okay. I think that's a fair
2 limitation. Obviously if in the course of your
3 proceedings, Mr. VerHagen, you come up with another
4 specific witness to give her to search; but you can't
5 search for an exhaustive list.

6 MR. VERHAGEN: Right.

7 THE COURT: So if you delineate; but at
8 this point, I will order the State to conduct an e-mail
9 search that would not otherwise be protected by office
10 work product for Israel Diaz, Alejondro Garcia, and
11 Edgar Ferrufino.

12 MR. VERHAGEN: Yes.

13 MS. HARDAWAY: As far as No. 2, I'll
14 agree to do a search for Garcia and his bond reduction,
15 although I think the record pretty well reflects that
16 that was a matter between the Trial Court and his
17 defense counsel, that the State didn't have anything to
18 do with that.

19 THE COURT: That is certainly my
20 recollection, because I lowered the bond.

21 MS. HARDAWAY: Right.

22 THE COURT: And I'm not sure that there
23 would have been any records. I don't think that there
24 are any court reporter records relative to Alejondro
25 Garcia's case.

1 MS. HARDAWAY: But if you want me to, I
2 will just do an e-mail search while I'm doing these
3 others.

4 THE COURT: That's fine. An e-mail
5 search relative to No. 2's request.

6 MS. HARDAWAY: So just for Alejondro
7 Garcia and bond reduction.

8 THE COURT: Right, and bond reduction.

9 MS. HARDAWAY: I've explained to
10 Mr. VerHagen, you have to be kind of specific about
11 these e-mails or else you're just going to come up
12 with --

13 THE COURT: Right, there has to be a
14 search term.

15 MR. VERHAGEN: Right.

16 THE COURT: With regard to No. 4, as it's
17 limited to Wendy Bardales --

18 MS. HARDAWAY: I will agree to do that.

19 THE COURT: As long as it would not
20 otherwise be protected by work product.

21 MS. HARDAWAY: Right. No. 6, I have an
22 objection to.

23 THE COURT: Let's -- we haven't discussed
24 No. 5.

25 MS. HARDAWAY: Oh, I'm sorry.

1 THE COURT: Is there anything --

2 MS. HARDAWAY: I can do a search for
3 anonymous tips. I think that's in one of the offense
4 reports and that's the only mention I saw of that, but I
5 can do a search for anonymous tips.

6 MR. VERHAGEN: And that's one of those
7 things that, you know, it's referenced in the police
8 report, these anonymous tips, and then we can't -- no
9 one seems to -- we can't seem to track them down.

10 THE COURT: Because they're anonymous.

11 MS. HARDAWAY: Or that might just be all
12 there is.

13 MR. VERHAGEN: Or any kind of reference
14 other than, Hey, someone from -- another person from the
15 gang unit called me and told me that this other person
16 said this. Any kind of earlier documentation to the
17 extent any exists, even if it's in HPD's hands, would
18 still fall under *Brady*, right?

19 MS. HARDAWAY: Well, I can't do a search
20 of HPD's e-mails.

21 THE COURT: Right.

22 MR. VERHAGEN: There's an ongoing duty
23 for the State to turn that over, correct?

24 MS. HARDAWAY: I don't have access to
25 their e-mails. I will do a search of our office

1 e-mails. If there is an external communication, I will
2 turn that over.

3 THE COURT: Right.

4 MR. VERHAGEN: Or even beyond an e-mail,
5 like an actual document that might exist that's not an
6 e-mail that reflects what was said on the tip.

7 THE COURT: And with all due respect,
8 that's the crux of the current problem with *Brady*. How
9 is Ms. Hardaway or anyone from the office supposed to
10 turn over something in the custody of HPD of which they
11 have no knowledge? And if you come up with a policy, I
12 will certainly -- and a way for her to be held
13 responsible for that; but what she can do is what she
14 has suggested, which is an e-mail search for any --

15 MS. HARDAWAY: Because basically we've
16 already turned over all documentary information except
17 what's protected by work product.

18 THE COURT: But she certainly can do an
19 e-mail search for that information.

20 No. 6, Ms. Hardaway, you said you had an
21 objection to?

22 MS. HARDAWAY: Yes, because that is
23 asking for internal communications between the State
24 internally discussing Wendy Bardales testifying in
25 Spanish. And again, I think that's pretty well

1 developed on the record that the State had a meeting
2 with her and it was her idea at that time to ask for an
3 interpreter because -- I mean, that wasn't at the
4 State's suggestion.

5 THE COURT: I don't know how you get
6 around the work product for those internal e-mails.

7 MR. VERHAGEN: Right. Documentation of
8 communications, so that would also include -- at least
9 my interpretation of it is that it also includes notes
10 that were taken during Ms. Bardales' interview. So to
11 the extent that we've already received notes for -- say
12 the State kept notes on their interviews with Mr. Diaz,
13 with Mr. Lopez, with Garcia. They kept notes with all
14 kinds of different witnesses they had interviews with
15 and there's no notes regarding Ms. Bardales and maybe
16 there aren't any. That's just -- we're requesting, to
17 the extent that they do exist, that the State provide
18 those.

19 MS. HARDAWAY: Those are protected work
20 product.

21 THE COURT: You already have notes from
22 the other?

23 MR. VERHAGEN: We have notes from
24 interviews with Diaz.

25 MS. HARDAWAY: You know, I'm happy to

1 look through what we held back as work product and if
2 there's something like that, I can submit it to you in
3 camera.

4 THE COURT: Okay. So at that point that
5 would be a ruling then. The State will look; if there
6 are witness notes for Bardales generated by the office,
7 I will review those in camera and make a determination
8 after that.

9 7, I think the: But not limited to --

10 MS. HARDAWAY: That's pretty much along
11 with 6.

12 THE COURT: I think 7 is subsumed by 6
13 unless you can delineate how --

14 MS. HARDAWAY: I think it is, too.

15 THE COURT: So I think the ruling for
16 Request 6, that I will review any evidence, to the
17 extent it exists, regarding internal conversations or
18 strategies as it relates to Ms. Bald- -- Bardales -- it
19 was a problem in the trial and it continues to be a
20 problem -- testifying in Spanish, I will review those in
21 camera to the extent those exist and make a ruling.

22 MR. VERHAGEN: No. 8, I don't -- there
23 were some witness -- I will say from the Court's
24 perspective that there were some e-mails regarding
25 accommodation or scheduling matters; but when I

1 e-mailed, I e-mailed all parties, or at least a
2 representative of all parties, depending on the exigency
3 of needing to get a quick e-mail out. Because as we all
4 know, there were seven lawyers.

5 MS. HARDAWAY: It was like herding cats,
6 I'm sure.

7 THE COURT: You are exactly right. So
8 can you do an e-mail search for that, Ms. Hardaway?

9 MS. HARDAWAY: Sure.

10 THE COURT: I guess -- and Deputy Gerac
11 and Deputy Jenkins were the Court's bailiffs at the
12 time, so I don't know if they sent any e-mails or not
13 but most of the e-mails probably would have come from
14 me.

15 All right. No. 9.

16 MS. HARDAWAY: That, I think, goes with
17 our ongoing --

18 THE COURT: The general, right.

19 Now, the objection to the 10th and today
20 added request for the capital murder summary, if it
21 exists, to explain the decision, I assume the State's
22 position is that would be covered by work product?

23 MS. HARDAWAY: Yes, Your Honor.

24 THE COURT: And I would tend to agree
25 unless you have a specific reason that it is not?

1 MR. VERHAGEN: Thank you, Your Honor.

2 THE COURT: Okay. Anything else?

3 MS. HARDAWAY: Can we go ahead and get
4 this transcribed and, Your Honor, if I could give Traci
5 just three weeks to get out of trial and then we can
6 meet back here.

7 THE COURT: Sure. Three weeks falls
8 squarely right in the week of Thanksgiving, so maybe we
9 could just have the first Thursday of December, which I
10 think is probably December -- between a death penalty
11 trial and Thanksgiving, she might need a moment. First
12 Thursday of December, which is Thursday, the 1st.

13 (Court in recess.)
14
15
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20
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24
25

EXH A

. 02111

1 STATE OF TEXAS
2 COUNTY OF HARRIS

3 I, Renee Reagan, Official Court Reporter in and
4 for the 179th District Court of Harris County, State
5 of Texas, do hereby certify that the above and
6 foregoing contains a true and correct transcription
7 of all portions of evidence and other proceedings
8 requested in writing by counsel for the parties to be
9 included in this volume of the Reporter's Record in
10 the above-styled and numbered cause, all of which
11 occurred in open court or in chambers and were
12 reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, offered by the respective parties.

16 WITNESS MY OFFICIAL HAND, this the 4th day
17 of November, 2015.

18
19 /s/Renee Reagan
20 Renee Reagan, CSR
21 Texas CSR 7573
22 Official Court Reporter
23 179th District Court
24 Harris County, Texas
25 1201 Franklin
Houston, Texas 77002
Telephone: 713.755.6340
Expiration: 12/31/16

Cause No. 1412826-A

EX PARTE

§ IN THE 179TH DISTRICT COURT

§ OF

JUAN BALDERAS,
Applicant

§ HARRIS COUNTY, TEXAS

AFFIDAVIT OF SPENCE D. GRAHAM

STATE OF TEXAS
HARRIS COUNTY

§
§

DATE: July 14, 2016

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Spence D. Graham, who being by me duly sworn, upon his oath deposes and says:

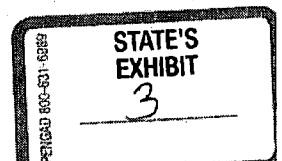
"My name is Spence D. Graham. I am a lawyer licensed in the State of Texas and my bar card no. is 24036665. I was an assistant district attorney for the Harris County District Attorney's Office from 2003 to mid-January, 2013. Since the beginning of 2013, I have been in private practice where the majority of my practice is devoted to criminal defense.

In May, 2009, I was transferred to the 179th District Court of Harris County, Texas, where I assumed responsibility for the prosecution of Juan Balderas and worked on the case for over two years. I remained in the 179th District Court until the end of December, 2011. Prosecutor Paula Hartman then became the chief prosecutor in that court and was responsible for Balderas' case.

Pursuant to the State's request, I recently reviewed handwritten notes of interviews (Applicant's Habeas Ex. 57) that were conducted with Israel Diaz. Pages 1 through 14 of the notes comprise the notes of prosecutor Caroline Dozier. Pages 15 through 23 are notes of a former Harris County District Attorney's Office prosecutor, George Weissfish.

When I was handling the Balderas case, the prosecution file consisted of six to eight well-ordered banker boxes organized by the various criminal offenses. Included in the boxes was a manila folder with Israel Diaz's name on it. The folder contained the interview notes of

EXH B



02115

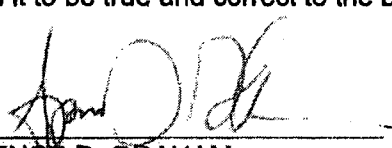
Page 2 of 2

Dozier and Weissfish as well as transcripts from the interviews that the police conducted with Diaz. I kept the prosecution files in my office and defense counsel were free to come to my office and review the contents of the boxes. While the Balderas case was assigned to me, I am sure that trial counsel (Godinich, Nunnery or both) reviewed the Balderas prosecution file although I have no memory of when that specifically happened.

Also included in the State's file was the capital murder summary that I prepared which was also available for trial counsel to review. Regarding Israel Diaz, the summary contained the following information:


- that Diaz told police and prosecutors previously handling the case that there was a hit out on the complainant and gang leaders had issued an "SOS" (or "shoot on Sight") for anyone in LTC that saw the complainant;
- that Diaz previously gave statements from jail with his lawyer to law enforcement that the applicant admitted to killing the complainant when they spoke that evening at Alejandro Garcia's house;
- that Diaz could assert that the hit out on the complainant was made by the leadership of the La Tercera Crips gang, and that it was because of not only the complainant's potential testimony, but because of his friendship with rival gang members and that the complainant would share LTC secrets with the rival gang; and
- that Diaz knew that the complainant's murder would occur."

I have read the above statement and find it to be true and correct to the best of my knowledge."


SPENCE D. GRAHAM
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 14TH day of July, 2016.




NOTARY PUBLIC in and for the
State of Texas

My commission expires: February 5, 2018

EXH B

02114

Writ Hearing
August 17, 2017

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 1412826-A

THE STATE OF TEXAS) IN THE DISTRICT COURT OF
)
V.) HARRIS COUNTY, TEXAS
)
JUAN BALDERAS) 179TH JUDICIAL DISTRICT

WRIT HEARING

On the 17th day of August, 2017, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Randy Roll, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Renee Reagan, Texas CSR No. 7573
Official Court Reporter, 179th District Court
1201 Franklin
Houston, Texas 77002

EXH C

.02115

Writ Hearing
August 17, 2017

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EXH C

. 02115

Writ Hearing
August 17, 2017

1 (Open court, defendant not present.)

2 THE COURT: On the record at this time --

3 MS. ECKHOFF: Your Honor, my client.

4 THE COURT: Yes.

5 (Defendant present.)

6 THE COURT: Let's go on the record.

7 We're in Cause No. 1412826-A, and introduce yourselves
8 and tell us who you represent.

9 MS. ECKHOFF: Your Honor, my name is Erin
10 Eckhoff. I'm with the Office of Capital and Forensic
11 Writs and we represent Mr. Juan Balderas in his
12 post-conviction proceedings.

13 MS. BLACK: Katherine Black, also from
14 the Office of Capital and Forensic Writs, also
15 representing Mr. Balderas, who is present.

16 THE COURT: And for the State?

17 MS. HUTCHINS: Farnaz Hutchins, that's
18 F-A-R-N-A-Z, representing the State along with.

19 MR. REISS: Joshua Reiss, R-E-I-S-S,
20 Harris County District Attorney's Office. Bar Card
21 No. 24053738. Good afternoon, Your Honor.

22 THE COURT: Good morning -- good
23 afternoon, yes.

24 All right. You may continue.

25 MS. ECKHOFF: Thank you, Your Honor.

EXH C

. 02117

Writ Hearing
August 17, 2017

1 We've filed an initial application for writ of habeas
2 corpus on Mr. Balderas' behalf that raised a number of
3 claims that, if established, would entitle him to habeas
4 relief. These claims include that State's witnesses
5 provided false testimony at trial. The impeachment --

6 THE COURT: Mr. Diaz, Mr. -- okay.

7 MS. ECKHOFF: Excuse me, sir? .

8 THE COURT: Go ahead.

9 MS. ECKHOFF: That the State withheld
10 impeachment evidence and as we have discussed a bit off
11 the record, that the jurors were exposed to a -- an
12 extraneous influence and that the Court, when that
13 influence was brought to their attention, waited until
14 after they reached a verdict to actually address it on
15 the record. Again, if these claims are proven as true,
16 then Mr. Balderas is entitled to habeas relief and I
17 think what's important to note at this point is that,
18 you know, we have the burden of proof. Mr. Balderas has
19 the burden of proof at this stage. Our application are
20 allegations that we are making. The State obviously has
21 responded and denied those allegations and we are
22 requesting an opportunity to put on the evidence
23 necessary to prove our claims. For that, we argue, an
24 evidentiary hearing is necessary. We need the
25 opportunity to put on our own evidence but also

EXH C

. 02118

Writ Hearing
August 17, 2017

1 challenge the State's evidence to the contrary. And we
2 urge that that's what due process requires in a death
3 penalty case like this.

4 As we also discussed a bit off the
5 record, trial counsel have submitted affidavits
6 responding to some of Mr. Balderas' claims, specifically
7 the ineffective assistance of counsel claims. We
8 don't --

9 THE COURT: And let me just say this.
10 I'll make some notes while you're talking. I just want
11 to interlineate, I know he had Mr. Jerome Godinich and
12 Alvin Nunnery.

13 MS. ECKHOFF: Yes.

14 THE COURT: And these are two lawyers
15 that have taken capital murder cases probably more than
16 any other pair of lawyers in the county. I don't know
17 of anybody that's had more than they. So I'm just --
18 you may continue but I want you to know I know who the
19 parties are.

20 MS. ECKHOFF: Sure. I appreciate that.

21 THE COURT: You may continue.

22 MS. ECKHOFF: We're simply stating that
23 the affidavits alone are not a sufficient form of fact
24 finding here. They certainly add to the facts at issue
25 but there are a number of problems with relying on

EXH C

.02115

Writ Hearing
August 17, 2017

1 affidavits and not doing an evidentiary hearing, the
2 most common sense of which is that it's really difficult
3 to cross-examine a written statement. You know, for
4 better for worse, when these types of claims are raised,
5 trial counsel often become adverse to their former
6 clients. They have an interest in defending themselves
7 from these claims and --

8 THE COURT: Because right now you're
9 claiming ineffective assistance of counsel, aren't you?

10 MS. ECKHOFF: Correct, yes.

11 THE COURT: I just want you to realize
12 that I know both parties well. I know they've had
13 probably dozens and dozens of cases --

14 MS. ECKHOFF: Sure.

15 THE COURT: -- like this. Those two
16 pioneered capital murder in this county, at this level,
17 at a very high level of sophistication. You may
18 continue.

19 MS. ECKHOFF: I appreciate that. And I
20 would just add that given the adverse dynamic that may
21 arise in these types of cases, it's fair for
22 Mr. Balderas to examine them and challenge them to the
23 extent necessary and if possible. But -- and as we
24 discussed off the record, we have had some opportunity
25 to do a cursory review of what we believe are the

EXH C

. 02120

Writ Hearing
August 17, 2017

1 accurate affidavits that were submitted and we've done
2 our best to identify problems with them and objections
3 we have to them at this point. We will be requesting
4 additional time to review them more thoroughly and
5 respond to the extent we have additional objections to
6 make but I'm happy to go through some of the initial
7 problems that I've noticed. First of all --

8 THE COURT: Why don't you do this for the
9 Court of Appeals, very quickly go through -- is it 10 or
10 11 errors that you're alleging?

11 MS. ECKHOFF: There were 14 claims.

12 THE COURT: Would you go through them
13 real quickly and summarize it?

14 MS. ECKHOFF: Sure. Okay. So, Claims 1
15 and 2 pertain to the testimony of Israel Diaz who
16 testified on behalf of the State after making a deal
17 with the State on the eve of Mr. Balderas' trial. And
18 in that deal, in exchange for his testimony, his own
19 capital murder charge was reduced to aggravated assault.
20 At the trial he gave an account of the night in
21 question, the night of the shooting, that he actually
22 had seen Mr. Balderas immediately after the shooting
23 take place and that Mr. Balderas confessed to him his
24 involvement. Now, in our post-conviction investigation,
25 of course we go back and talk to Mr. Diaz about his

Writ Hearing
August 17, 2017

1 involvement in Mr. Balderas' trial and at that time he
2 recanted his testimony. He said that he actually did
3 not even see Mr. Balderas the night of the shooting and
4 that Mr. Balderas has never confessed to him.

5 THE COURT: Did he also say that he --
6 that the prosecutors at the time told him that his
7 statement that he didn't see that, the murder, that
8 wasn't acceptable and they told him he had to say that
9 he did see it? Is that right? Are you alleging that?

10 MS. ECKHOFF: That is what he reported to
11 our investigator.

12 THE COURT: Also Mr. Isbell has given a
13 statement, an affidavit, saying he was there every
14 moment that they were together with the prosecutors and
15 he never heard that.

16 MS. ECKHOFF: I understand.

17 THE COURT: I want you to realize
18 Mr. Isbell is the highest caliber attorney that we have
19 here. I hold him in incredibly high esteem and I
20 believe him. I'm telling you that.

21 MS. ECKHOFF: Okay.

22 THE COURT: So I'm just trying to say --
23 go ahead. You may continue summarizing.

24 MS. ECKHOFF: And I appreciate that and I
25 would just point out, though, for the first -- for Claim

EXH C

.02122

Writ Hearing
August 17, 2017

1 1, that was brought under *Brady* and *Giglio*, that would
2 require the prosecutor knowing that it's false. The
3 second claim is under *Ex Parte Chabot* and *Chavez* and
4 that doesn't require that the State actually know that
5 it was false testimony. So to the extent that you've --
6 it is, you know, possible that in fact the State did not
7 do that as Mr. Diaz said but he still provided false
8 testimony, that still entitles Mr. Balderas to relief.

9 Claim 3 is a *Brady* claim where in post
10 conviction, the State turned over documents and within
11 those documents we found 23 pages of handwritten notes
12 of State meetings with Israel Diaz in the many years
13 leading up to this testimony that he gave where he gave
14 differing accounts of what happened the night of the
15 shooting and surrounding the shooting. Those were notes
16 that we did not find in our review of trial counsel's
17 file and to the best of our ability, comparing it
18 against what we understood trial counsel to have in
19 their possession, raised a *Brady* claim that those had
20 not actually been turned over as impeachment evidence.
21 They were prior inconsistent statements that they could
22 have used to cross-examine Diaz.

23 THE COURT: Would it help if after she
24 gives one, you could give your rebuttal to each one of
25 these?

Writ Hearing
August 17, 2017

1 MS. HUTCHINS: If you'd like, Your Honor.
2 I was going to ask you at the end how you wanted me to
3 do it, if you wanted me to just do it very succinctly or
4 do them one by one.

5 THE COURT: As she's doing it succinctly,
6 you can. We'll go back. I apologize. I've not had a
7 death case before and I know this is different, but I
8 want to have all the information. Only you were giving
9 your side of it. I would like to have a rebuttal. So,
10 let's back up to the first one. And so, do you
11 remember?

12 MS. HUTCHINS: Yes, Judge. So, our
13 response to that, Judge, is that the Court can resolve
14 Grounds 1 and 2 based on --

15 THE COURT: And what were they again?

16 MS. HUTCHINS: The false testimony,
17 whether it was knowingly presented by the State or
18 unknowingly presented by the State, that that can be
19 resolved by this Court based off of the prevailing case
20 law that's noted in the State's answer as well as the
21 exhibits that were attached to the State's answer,
22 namely, the credible affidavit of Mr. Isbell who stated
23 that he was at each of the meetings, that the State did
24 not pressure Mr. Diaz to change his statement and that
25 Mr. Diaz testified as Mr. Isbell expected him to, as

Writ Hearing
August 17, 2017

1 well as the affidavit of Traci Bennett, the State's --
2 one of the State's prosecutors, that refutes Mr. Diaz's,
3 I guess -- if we're even going to attribute the
4 statement to Mr. Diaz's statements post-conviction. The
5 reason I say if we're even going to attribute those to
6 Mr. Diaz are that the applicant now is relying on a
7 post-conviction affidavit from their habeas
8 investigator. It's not actually an affidavit from
9 Mr. Diaz himself.

10 THE COURT: I know. It's a hearsay
11 document.

12 MS. HUTCHINS: It's a hearsay document.
13 So there's plenty of case law along with those that say
14 hearsay documents are not dispositive and not worthy of
15 an evidentiary hearing especially in this situation
16 where Mr. Diaz himself refused to sign an affidavit.

17 THE COURT: Okay.

18 MS. HUTCHINS: Those would be our
19 responses succinctly, Judge, to the first two.

20 THE COURT: That's the first two.

21 MS. HUTCHINS: First two.

22 THE COURT: Have you gone into the --

23 MS. ECKHOFF: I was only starting on the
24 third but just to --

25 THE COURT: Take your time.

EXH C

. 02125

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: -- address that, we admit
2 that the affidavit that we submitted is a hearsay
3 affidavit and I understand that and that's why our
4 position is that it's very important to get Mr. Diaz in
5 here where everybody can hear him account for -- address
6 his recantation and the circumstances surrounding that
7 when he's here in person and under oath.

8 With Claim 3 we were discussing was the
9 Brady claim regarding the prior inconsistent statements
10 of Mr. Diaz that to our best information had not been
11 provided to trial counsel because they were not present
12 in trial counsel's file as they turned it over to us.
13 And at this point, it apparently -- the State has
14 actually taken contradictory positions on these notes at
15 various times. Of course the State in their answer
16 state that these notes were made available to defense
17 counsel because they were in the trial file and
18 available to review at any time. However, in the fall
19 of 2015 when we were actually in court on a motion that
20 we had made for disclosure of this type of evidence and
21 specifically these types of notes of witnesses, the
22 attorney representing the State at that time represented
23 at two different hearings before the Court that those
24 notes constituted work product and were privileged as
25 work product and had not been provided to trial counsel

EXH C

Writ Hearing
August 17, 2017

1 and would not be provided to trial counsel and that
2 their disclosure to us in post-conviction had been
3 inadvertent and therefore did not constitute a waiver of
4 access to other similarly situated notes.

5 So while the State's position now is that
6 they were always available to trial counsel, we have had
7 differing representations in the course of these
8 proceedings.

9 THE COURT: And presumably you have a
10 trial transcript or post-trial transcript saying just
11 what you said?

12 MS. ECKHOFF: I do.

13 THE COURT: They were not provided and
14 that they were work product?

15 MS. ECKHOFF: That's correct.

16 THE COURT: Okay.

17 MS. ECKHOFF: I have copies of that if
18 you would like to see it.

19 THE COURT: You want to respond?

20 MS. HUTCHINS: First off, Judge, the --
21 in terms of it being *Brady* information that was withheld
22 and not disclosed, in the State's answer there are
23 affidavits, credible affidavits, from Spence Graham who
24 handled the case early on in its stages and said that
25 the trial file was open. Defense counsel could have

EXH C

. 02127

Writ Hearing
August 17, 2017

1 access to it and these notes were available and that the
2 content of the notes in Israel Diaz's statements were
3 included in the State's capital murder summary, which is
4 a document that is prepared by the District Attorney's
5 Office, a copy of which was given to defense counsel.

6 Also, we have the affidavit of Traci
7 Bennett, who was one of the trial prosecutors, who says
8 that these notes were in the file and available for
9 review. We also have the affidavits now of Jerome
10 Godinich and Alvin Nunnery, both of whom say that they
11 reviewed these notes in -- I think Jerome Godinich said
12 he personally reviewed these notes pretrial during his
13 review of the State's file at the DA's Office and he
14 took notes from any inconsistencies into account during
15 his trial prep. His log hours reflect the time that he
16 spent reviewing the State's files here at the DA's
17 Office. Mr. Nunnery says he was also aware of these
18 notes pretrial and used what he believed was beneficial
19 to the defense in his cross-examination.

20 As pointed out in the State's answer,
21 these notes also have inculpatory information that's
22 consistent with Mr. Diaz's trial testimony. The notes
23 are attached, I believe, as one of the exhibits to the
24 applicant's file. I have reviewed the notes. The
25 Court -- I'm not sure if the Court has or not but if the

EXH C

. 02125

Writ Hearing
August 17, 2017

1 Court wants to look at the notes, the Court will see or
2 may have already seen that these notes are basically a
3 long stream of consciousness. There's no real division
4 of this event, this event, this event. And so, I think
5 it's important to point out that it's their handwritten
6 notes taken by whoever was listening to the conversation
7 and we can't hold them as this giant gold standard. We
8 can just say the defense was aware of them pretrial.

9 The trial record also does not reflect
10 that the defense attorneys were hindered or surprised in
11 any way during Israel Diaz's testimony, that they were
12 able to do an effective and thorough examination.
13 Applicant's Exhibit No. 56 that they have attached is
14 actually an e-mail from Mr. Godinich to the defense team
15 that tells of some -- of a pretrial hearing that they
16 had with the State and that they actually learned some
17 of the State's case in that pretrial hearing and learned
18 some information that they did not know pretrial. And
19 at that point, even before they started trial, he's now
20 memorialized that still before trial they've learned
21 even more of the State's case, some of the State's
22 theory of the case. And so our argument would be that's
23 another example of how they did notice some of the
24 inconsistencies.

25 I think it's also important to point out

EXH C

.02129

Writ Hearing
August 17, 2017

1 that there's a difference between the openness of a file
2 during the pendency of a case, as the case is pending in
3 the court, as trial is coming, and then the availability
4 of the file post-conviction. And the attorneys that
5 handle the cases and are responsible for the cases
6 during trial and pretrial are different than the
7 attorneys from the office that handle the case
8 post-conviction. And so, I haven't seen the transcript
9 that the defense is talking about, about our office
10 saying that these notes were not available, have never
11 been available during trial; but I can tell you this,
12 that the prosecutors who handle PIA discovery, public
13 information discovery post-conviction, are with our
14 general counsel department and they have rules and
15 guidelines that they use generally as to what they think
16 has been disclosed during the pendency of a case, what
17 they think should not be disclosed, or that is
18 privileged, which may be entirely different -- and in
19 this case appears to be entirely different -- than what
20 the State's attorneys actually allowed the defense
21 attorneys to see.

22 MS. ECKHOFF: Just on that point --

23 THE COURT: You may respond.

24 MS. ECKHOFF: The attorney for the State
25 that made those representations in court had nothing to

EXH C

. 02130

Writ Hearing
August 17, 2017

1 do with the PIA office or whoever would do that. It was
2 the attorney who was previously handling this case prior
3 to Ms. Hutchins. It was the person working in the
4 post-conviction unit. And just also to touch base on --

5 THE COURT: What do you say about what
6 Ms. Farnaz has said about Mr. Godinich and Mr. Nunnery
7 say they had access to those notes that you say were not
8 provided?

9 MS. ECKHOFF: Well, Your Honor --

10 THE COURT: Both of them say they had
11 access to it pretrial.

12 MS. ECKHOFF: I appreciate that and you
13 also have to realize, Your Honor, that we didn't know
14 that at the point at which we made these claims. We
15 only found that out yesterday upon receipt of the
16 affidavits.

17 THE COURT: So are you rescinding your
18 claim then?

19 MS. ECKHOFF: No. I believe we should
20 have the opportunity to examine them further regarding
21 their access.

22 THE COURT: I'm just trying to tell you
23 that it's greatly weakened by -- what these affidavits
24 that have been provided by the two attorneys.

25 You were onto which one now?

EXH C

. 52131

Writ Hearing
August 17, 2017

1 MR. REISS: Judge, I'm sorry. Can we go
2 off the record for one moment?

3 (Mr. Reiss not present.)

4 THE COURT: Please continue.

5 MS. ECKHOFF: Are we back on the record?

6 THE COURT: Yes, we're back on the
7 record. You're addressing which point of error?

8 MS. ECKHOFF: I just want to make one
9 more point just about what Ms. Hutchins said --

10 THE COURT: Sure.

11 MS. ECKHOFF: -- regarding what she
12 called the capital murder summary and actually what she
13 just indicated here, that some of this information had
14 been put together in a capital murder summary which was
15 provided to trial counsel, again, that is not a document
16 that we have been able to find in trial counsels' files
17 and post-conviction we haven't had that provided to us
18 either. So I would at least make a request to be able
19 to see that document.

20 MS. HUTCHINS: That's probably fair.

21 THE COURT: If they have it, if they can
22 find it, that will be fine. I'm sure you should be
23 allowed to see it.

24 MS. ECKHOFF: Thank you.

25 THE COURT: Tell us the next point of

EXH C

. 02132

Writ Hearing
August 17, 2017

1 error.

2 MS. ECKHOFF: The -- I'll keep all of
3 the -- if it's all right with Your Honor, go out of
4 order and --

5 THE COURT: Go however you want to do it.

6 MS. ECKHOFF: And discuss the ineffective
7 assistance of counsel claims together. Then I'll jump
8 to Claim 5 which was the claim regarding the extraneous
9 influence on the jury.

10 THE COURT: From the passenger on the bus
11 from the motel in the seedy part of town?

12 MS. ECKHOFF: Correct. And, Your Honor,
13 that wasn't my description of it; that was the juror's
14 description of it. And I would just point out that
15 whatever the circumstances of the waving incident or as
16 the jurors interpreted it, the intimidation incident, we
17 provided affidavits explaining that that was not how it
18 actually happened. Regardless, the primary issue there
19 is not so much that but what effect it had on the
20 jurors. And affidavits from the jurors make clear that
21 this was a very stressing event for them and that they
22 felt threatened not for only their own safety but for
23 the safety of their family and then after having two
24 days, almost two days full of deliberation and an Allen
25 charge, come back the next day and within hours come to

EXH C

. 02133

Writ Hearing
August 17, 2017

1 a guilty verdict. So, again, the important aspect there
2 is the effect that it would have had on the jurors or
3 not even these specific jurors but hypothetical jurors
4 perceiving that the way that they did.

5 The other aspect of that is the fact that
6 as we understand it from our investigation, although the
7 record is not clear on this, is that the Court actually
8 was informed of this incident prior to the verdict
9 coming in.

10 THE COURT: The waving?

11 MS. ECKHOFF: The waving, yes. That she
12 had been made aware that this had happened and -- I
13 mean --

14 THE COURT: When did the judge have a
15 hearing asking those -- I believe he [sic] had a hearing
16 asking all 12 jurors if that would have an influence on
17 them?

18 MS. ECKHOFF: That is not entirely
19 correct. So what she did is there was the verdict, they
20 deliberated for a couple more hours, they came up with
21 their verdict, they announced the verdict. They took a
22 lunch break and upon the return of the lunch break,
23 Judge Guiney has an informal hearing where she sends the
24 bailiff, who was present and described these incidents
25 on the record, back to the jury room to pick out which

Writ Hearing
August 17, 2017

1 jurors he thought may have been the most affected by it.
2 So, they -- she did speak to 2 of the 14 jurors. We
3 provided affidavits from five additional jurors
4 recounting their reactions to those events that were
5 never put on the record in this case because they were
6 not questioned as well. And again, yes, they were
7 asked, hey, did this affect your verdict but this was
8 after the verdict was already reached. And, you know,
9 what is a juror going to say at that point? No, Your
10 Honor, I shouldn't have voted this way?

11 THE COURT: I disagree with you. I think
12 that's what a juror would say if that's -- was it. I
13 mean, you can think what you want --

14 MS. ECKHOFF: Fair enough.

15 THE COURT: -- but I'm thinking that if
16 you ask a juror did it affect you, I --

17 MS. ECKHOFF: And the standard -- another
18 point, which I've already mentioned but I'll make at
19 this point again, is just that the standard isn't these
20 specific jurors and if their specific verdict, rather
21 did the event -- would the event have affected the
22 decision-making of a hypothetical juror in those
23 circumstances and with those same perceptions.

24 THE COURT: I don't have any idea what
25 that means then. How would that apply to this case? A

EXH C

. 02135

Writ Hearing
August 17, 2017

1 hypothetical jury? We're only talking about did it
2 influence any juror to vote a special way. You may
3 continue.

4 MS. ECKHOFF: I think that's the summary
5 of the claim.

6 THE COURT: Okay.

7 MS. HUTCHINS: Judge, during the pendency
8 of, I guess, the time period when the application was
9 filed, when the State filed their answer, the Appellate
10 Court rendered its opinion overruling the direct appeal.
11 And one of the issues that the applicant actually raised
12 on direct appeal was whether the applicant argued his
13 due process rights and his right to an impartial jury
14 was affected and tainted because of this alleged juror
15 misconduct. And the Court of Criminal Appeals decided
16 that these rights were not affected, the jury was not
17 affected.

18 THE COURT: The Court of Criminal
19 Appeals?

20 MS. HUTCHINS: Correct, Judge. Has
21 decided already on his direct appeal that his right to
22 an impartial jury and right to due process were not
23 affected. The juror misconduct as reflected by the
24 examination of the jurors and the bailiff in the
25 courtroom did not have an effect on the jurors and their

EXH C

. 02135

Writ Hearing
August 17, 2017

1 verdict. And the Court of Criminal Appeals has stated
2 that the Court did not err by overruling the defense's
3 motion for mistrial because they did, in fact, move for
4 a mistrial even after the jurors were questioned and
5 even after the jurors said it did not affect their
6 verdict. And so, to that end, because the Court of
7 Criminal Appeals has already made a determination on
8 this issue, we would argue that the applicant is now
9 procedurally barred from this issue. The issue's
10 already been resolved.

11 However, even still, we have the
12 affidavit of Vickie Long, who is one of the managers for
13 the court system, who stated that the reasons why the
14 motel on the first night was picked, because there was
15 limitations with Rodeo Houston. The Court was even
16 unaware that it happened until the next morning. It was
17 out of their hands.

18 THE COURT: You're from Austin, huh?

19 MS. ECKHOFF: Not even originally.

20 THE COURT: Forgive me, but when the
21 rodeo's in town, there are no good viable options for
22 places to stay because they are booked and they are
23 booked months in advance, especially anywhere on this
24 side of town.

25 MS. HUTCHINS: So it's actually on the

EXH C

.02157

Writ Hearing
August 17, 2017

1 record that the Court was made aware the next morning
2 and the Court did not know and for the second night
3 found somewhere far away but was trying to accommodate
4 the situation.

5 THE COURT: Where was it the first time?

6 MS. HUTCHINS: I'd have to look it up,
7 Judge.

8 MS. ECKHOFF: It was --

9 THE COURT: What's the name of the place?

10 MS. ECKHOFF: I believe it was called the
11 Motel 6 Westfield.

12 MS. HUTCHINS: Westchase, I believe.

13 MS. ECKHOFF: Westchase.

14 THE COURT: Motel 6?

15 THE REPORTER: They went all the way past
16 Clear Lake. They looked everywhere.

17 MS. HUTCHINS: They looked everywhere. I
18 think they ended up having the hotel the second night --
19 and I may be mistaken -- but I think the second night it
20 was in Willowbrook.

21 THE COURT: And you were the court
22 reporter at that time?

23 THE REPORTER: Yes, sir.

24 MS. HUTCHINS: Also, Judge, based off
25 of --

EXH C

. 02135

Writ Hearing
August 17, 2017

1 THE COURT: This occurred in 2005, the
2 death occurred in 2005?

3 MS. HUTCHINS: Yes, Judge. The trial
4 happened in 2014.

5 THE COURT: See, I was the judge until
6 2012 and now -- so.

7 MS. HUTCHINS: Also, Judge, pursuant to
8 Texas Rule of Evidence 606(b) and prevailing case law on
9 the issue, juror affidavits are not admissible to
10 address the mental processes and deliberations of jurors
11 unless they are outside influences. And the case law
12 shows that these types of actions which occurred in this
13 case do not qualify as outside influences. And so, the
14 juror affidavits that they're relying upon, what our
15 argument would be, would be inadmissible.

16 Also, I'm a little bit confused by
17 opposing counsel's argument that we're talking about a
18 hypothetical jury because we need to address the jury in
19 this case for this applicant in this trial.

20 So, other than that, I don't know if you
21 didn't mention it or if you're abandoning it, there was
22 an issue with a Facebook post.

23 MS. ECKHOFF: Yes, there was the issue
24 with the Facebook post.

25 MS. HUTCHINS: I can or you want to?

EXH C

. 02135

Writ Hearing
August 17, 2017

1 THE COURT: You go first.

2 MS. ECKHOFF: Real quick, to respond to
3 what she just said, I think actually what she mentioned
4 with the issues of 606(b) and how the jurors' particular
5 mental impressions and decision-making is outside of the
6 scope based on 606(b), I think that's where this idea of
7 it's more of a hypothetical --

8 THE COURT: And summarize 606(b) for the
9 record.

10 MS. ECKHOFF: Sure. Under 606(b) the
11 statements going to or evidence going to the jurors'
12 decision-making process in coming to their verdict are
13 not admissible except for, as Ms. Hutchins noted, if
14 there's an issue of an extraneous influence, which is of
15 course the basis of our --

16 THE COURT: And I don't think the
17 location of a hotel would be an extraneous that would
18 qualify here -- I just want to tell you what I'm
19 thinking now -- and someone waving at them on a bus.
20 All right.

21 MS. ECKHOFF: Regarding the Facebook
22 messages, in our investigation we discovered the
23 Facebook posts of one of the jurors sitting on the jury.
24 And despite admonitions from the Court that they are not
25 to discuss the case, including on social media, repeated

EXH C

. 02140

1 admonitions from the Court to that effect, he made
2 multiple posts on Facebook regarding his jury service in
3 the midst of his jury service.

4 THE COURT: Did he say anything about
5 deliberations or guilt or innocence or anything like
6 that?

7 MS. ECKHOFF: Forgive me for not
8 remembering the exact details --

9 THE COURT: That's okay.

10 MS. ECKHOFF: -- of his posts from -- but
11 he did discuss the difficulty that he was feeling and
12 being bored by expert testimony and more importantly,
13 our understanding is that one of the reasons the jurors
14 are admonished not to discuss this is because you want
15 to make sure that people don't feel free to offer their
16 opinions on how things should go while you're sitting on
17 there. And not only did he post, but his posts
18 encouraged one of his friends to respond by saying
19 something along the lines of "Give him the chair or fry
20 him," you know, basically making clear what his position
21 would be on what the verdict should be. And all I'm
22 saying, Your Honor, is that's exactly why we -- you --
23 inform jurors that they should not be doing these
24 things.

25 THE COURT: And that, I agree with you.

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: So it's juror misconduct.

2 THE COURT: I guess the question would be
3 how serious is this. So, go ahead.

4 MS. HUTCHINS: Judge, we'd argue that the
5 applicant fails to show any sort of prejudice or harm
6 from these Facebook posts. There were 17 posts. None
7 of them discuss the facts of the case or the content of
8 the deliberations or make any sort of comment about his
9 bias or partiality, which side he was leaning towards.
10 The comment about the experts, I believe, was something
11 along the lines of "just endless testimony from
12 experts." There were experts on both sides of this
13 case. So there's no way that we can tell one way or
14 another what he's even talking about. There's no
15 indication that he was affected by any of the comments
16 that came back to him. He didn't respond to any of the
17 comments that other people posted. There's no evidence
18 that any of the other jurors were influenced by this or
19 knew about these Facebook posts. It is the applicant's
20 burden in this case and even in their writ application
21 they say that it is speculative and it can't be
22 ascertained if this conduct led to votes being changed.

23 THE COURT: Yes, ma'am.

24 MS. ECKHOFF: Your Honor, the entire
25 reason that we're asking for further fact development is

EXH C

.02142

Writ Hearing
August 17, 2017

1 because, as Ms. Hutchins noted, we don't know what, if
2 any, effect these things had because we haven't had fact
3 development on what that might have been.

4 MS. HUTCHINS: Which would break the
5 curtain, Judge, the juror curtain under 606.

6 THE COURT: So, go to the next one.

7 MS. ECKHOFF: Your Honor, at this point
8 I'll mention that we've raised five claims of
9 ineffective assistance of counsel at various points of
10 the trial: Guilt, punishment phase, but also pretrial
11 and jury selection. These are very -- I'm not even sure
12 I can succinctly go through all of these aspects --

13 THE COURT: Try.

14 MS. ECKHOFF: But so, our review of trial
15 counsels' file indicated very little guilt phase
16 investigation. We have a case where the client, as
17 trial counsel make clear in their affidavits, maintained
18 his innocence in this case. And there seems to be very
19 little evidence of investigation from the trial file,
20 which is what we have, you know, to rely on in assessing
21 their investigation. In the course of our
22 investigation, we were able to locate and obtain
23 affidavits from witnesses who provide Mr. Balderas with
24 an alibi for the night of this event and those -- some
25 of those witnesses were available to trial counsel

EXH C

.02143

Writ Hearing
August 17, 2017

1 because trial counsel spoke to them as potential
2 character witnesses for the punishment phase and others
3 we got to through following the investigation further.

4 And what is important to remember is, you
5 know, the standard is whether or not the investigation
6 was reasonable or failure to continue or further their
7 investigation was reasonable in light of what they knew
8 at the time. And it doesn't -- our position is that
9 their failure to further investigate his guilt claims
10 were unreasonable.

11 Another point within that claim is their
12 use of an eyewitness identification expert. So you may
13 recall that one of the -- from what I -- your review of
14 the case that one of the witnesses against Mr. Balderas
15 was an eyewitness who was present at the time of the
16 shooting and she testified, you know, eight years after
17 the fact about her identification. And what was
18 interesting and really problematic about her
19 identification of Mr. Balderas was that in the immediate
20 aftermath of the shooting, the same night when she's
21 giving her statement to the police, she says that she
22 had never seen the shooter before and she did not know
23 who he was. She knew Mr. Balderas, had spent time with
24 him, had been around him in, you know, roughly the year
25 leading up to when the shooting occurred. She knew who

EXH C

.02144

Writ Hearing
August 17, 2017

1 he was and she said that she didn't know who the shooter
2 was. She didn't make an identification of Mr. Balderas
3 until a week after the crime occurred and even then, the
4 CCA has agreed, in considering this on direct appeal,
5 that the identification procedures used by the police in
6 this case were suggestive. They disagreed as to whether
7 or not that entitled him to relief at direct appeal but
8 they agree that the procedures were suggestive, the
9 majority of the CCA did.

10 At trial they did, at the last minute,
11 decide to challenge this eyewitness identification.
12 They retained an expert, Dr. Roy Malpass, to come and
13 testify. They made an effort to get the eyewitness
14 struck and not to present it. And in so doing, they had
15 a hearing outside the presence of the jury where
16 Mr. Malpass explained his expertise and why there are
17 problems with this identification and the lineup
18 procedures. The Court declined to, you know, strike the
19 identification and allowed the witness to testify but
20 she also specifically made a ruling that the defense
21 could call Dr. Malpass to testify before the jury to
22 explain to them what the problems could be with this
23 identification and with these procedures, and without
24 opening the door to extraneous conduct. That happened
25 twice on the record.

EXH C

02145

Writ Hearing
August 17, 2017

1 Trial counsel, in their affidavits, site
2 as their reason for not calling Dr. Malpass to come
3 testify before the jury is that it was a decision in
4 order to avoid extraneous influences coming in -- or I'm
5 sorry -- extraneous conduct coming in. They believed it
6 would open the door. It's unclear to us, based on the
7 affidavits alone, why they believed that the Court,
8 after saying that they could put this evidence on
9 without opening the door, would in fact open the door.

10 And then, within that, it's an
11 interesting thing. One of the counsel actually
12 representing Mr. Balderas at trial who took witnesses
13 and examined witnesses and made argument was Scott
14 Shearer who is actually direct appeal counsel in this
15 case as well. And Scott Shearer was responsible for the
16 motion for new trial --

17 THE COURT: That's in this county?

18 MS. HUTCHINS: Yes, Judge.

19 THE COURT: I don't know him. He's the
20 only party I don't know yet.

21 MS. ECKHOFF: So included in our guilt
22 phase, IAC claim is a motion -- or I'm sorry -- a claim
23 that --

24 THE COURT: Take your time. I'm not
25 hurrying you. I'm giving you as much time as you need.

EXH C

.02146

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: I appreciate that. That
2 trial counsel or Mr. Shearer was ineffective for failing
3 to conduct any sort of extra record investigation of
4 some of these juror issues that could have been used in
5 the motion for new trial. We made an IAC claim to that
6 effect, not only in his role as appellate counsel for
7 that claim but the fact that he was involved in this
8 entire trial proceeding. One of the points that we
9 would raise is that we have affidavits from Mr. Godinich
10 and Mr. Nunnery but the Court and the State have never,
11 as far as I know, asked Mr. Shearer to provide any
12 response to Mr. Balderas' allegation.

13 THE COURT: And have you? Have you asked
14 for --

15 MS. ECKHOFF: Actually, we did.

16 THE COURT: I mean, you have the same
17 right to ask those things.

18 MS. ECKHOFF: Your Honor, when we were
19 here on -- in front of Judge Guiney -- I would have to
20 go back and remember what the date of that was. I
21 apologize. But we were here on the record arguing much
22 of these same things and us arguing that an evidentiary
23 hearing was necessary, it was when we were arguing the
24 motion for -- or for an ODI, an order designating
25 issues. At that time when it became clear to us that

EXH C

.02147

Writ Hearing
August 17, 2017

1 Judge Guiney was going to enter into an order for trial
2 counsel to submit affidavits and the State had only
3 requested for Mr. Nunnery and Mr. Godinich to submit
4 affidavits, we made an oral motion at that time that
5 Mr. Shearer also be included in that. She had indicated
6 on the record that she was going to do that and -- but
7 only signed the State's order verbatim that didn't
8 include him.

9 THE COURT: You didn't do any follow-up
10 to ask her to do that?

11 MS. ECKHOFF: Your Honor, I don't recall.
12 I would have to --

13 THE COURT: I'm just saying, you have the
14 same subpoena power that the State does and if you don't
15 do that, who's going to do it? So, okay. I'm just
16 trying to tell you where I'm coming from, and what I'm
17 hearing is you have the same ability to call that person
18 and you didn't. Okay. Let's proceed.

19 MS. ECKHOFF: I think that's -- I think
20 that that is the guilt phase IAC claims. I don't know
21 if you want to address those and then move on to others?

22 THE COURT: Yes, you want to address --
23 there was quite a bit that she had.

24 MS. HUTCHINS: Yes, if I may, Judge, and
25 I may take them out of order.

EXH C

. 02148

Writ Hearing
August 17, 2017

1 THE COURT: Whatever order you take them
2 in, that will be fine. If you want to, you can bring
3 chairs up there and sit down. You've been standing for
4 45 minutes. You're welcome to sit down if you like.

5 MS. BLACK: Thank you, Your Honor.

6 THE COURT: And you --

7 MS. HUTCHINS: I may take you up on that,
8 Judge. Thank you, Judge.

9 THE COURT: Just pull one up and sit
10 down.

11 MS. HUTCHINS: Judge, as you are more
12 than aware, there was extensive evidence against the
13 applicant in this case. Not only was he charged with
14 this capital murder, he was charged with another capital
15 murder, as well as an assault; and in addition to that,
16 there were three other murders that were put on in
17 punishment and an aggravated --

18 THE COURT: As extraneous?

19 MS. HUTCHINS: As extraneous.

20 THE COURT: I don't know -- I assume
21 that's his family here. But I don't know if they
22 understand that, that he's charged with one murder
23 and --

24 MS. HUTCHINS: There are at least four
25 other murders, whether you characterize them as capital

EXH C

. 02145

Writ Hearing
August 17, 2017

1 murder or murder, that were charged against him and two
2 assaults.

3 THE COURT: There were four other
4 murders, or four murders total; is that right?

5 MS. HUTCHINS: Yes, Judge. No, five.

6 THE COURT: Five. So maybe you didn't
7 know that, that they wanted to charge him with that but
8 they proceeded with one case.

9 Is that correct?

10 MS. HUTCHINS: Correct, Judge.

11 THE COURT: I wasn't the judge.

12 MS. HUTCHINS: There was also a larger
13 investigation going on to the La Tercera Crips gang that
14 the applicant was tied to and so there was this big
15 investigation trying to sort of parse out all of these
16 different crimes. All of this, I believe, ended up
17 being in total, I think, 88 different offenses that the
18 State gave the defense notice of. So there was a whole
19 host of information that trial counsel over the years
20 were sifting through.

21 THE COURT: Let me just say that to the
22 audience because I think y'all would like to know what's
23 happening. They're saying there were 88 -- 8-8 -- 88
24 different extraneous offenses that they could have used
25 in trial against --

EXH C

. 02150

Writ Hearing
August 17, 2017

1 MS. HUTCHINS: And bad acts, Judge, if I
2 may correct.

3 THE COURT: And bad acts against
4 Mr. Balderas. I just want you to know, 88. So, okay.

5 MS. HUTCHINS: And to assist trial
6 counsel, the record will reflect that they hired a host
7 of different investigators, fact investigators,
8 mitigation investigators, experts, specialists. I
9 believe they had experts on mental health, gangs, the
10 prison system, child abuse, brain development, and
11 eyewitness identification. So there was an extensive
12 defense team going on in this case. The vouchers that
13 were turned in to the Court show that there were
14 multiple meetings with the defendant's family, including
15 the defendant's mother, his brother, his girlfriend.
16 Just from 2013 to 2014, there were 26 meetings with the
17 defendant's girlfriend.

18 THE COURT: Is she here?

19 MS. HUTCHINS: I believe she's the wife,
20 Your Honor. Yes.

21 THE COURT: Okay.

22 MS. HUTCHINS: Also, the applicant has
23 attached a number of different e-mails as exhibits.
24 I've been able to count at least ten e-mails that they
25 have attached to their writ from different members of

EXH C

. 52151

Writ Hearing
August 17, 2017

1 the defense team which reflect unfavorable and
2 uncooperative witnesses which reflect -- which dispute
3 the alibi defense and which show that the defendant's
4 mom actually attempted to thwart the defense
5 investigation.

6 THE COURT: Who did?

7 MS. HUTCHINS: The defendant's mother.

8 THE COURT: Is she here?

9 MS. ECKHOFF: Yes, Your Honor.

10 MS. HUTCHINS: That the defense had
11 trouble with the defendant's mother and these are all
12 documented in the e-mails between the different defense
13 mitigation experts and trial counsel that the applicant
14 has attached as exhibits to his writ. For example, the
15 defendant's mother did not want the defense to contact
16 the family in Mexico and did not want the family from
17 Mexico coming to visit the defendant. That the various
18 family members including the girlfriend, Yancy Escobar,
19 came to the office, was told that defense is continuing
20 to pursue leads but urging the family to give them any
21 information, names, phone numbers, contact information
22 that they had and stressing how important it was because
23 the defendant himself did not have those names and
24 information and he kept telling the defense, My brother
25 and my girlfriend have them.

EXH C

. 02152

Writ Hearing
August 17, 2017

1 And the struggle that the defense had to
2 get this information, the e-mails also showed that it
3 was not until early 2014 that the defendant's family
4 finally gave them information about an alibi and when
5 they pursued this potential alibi, they were told by the
6 defendant's brother, This woman wants nothing to do with
7 this case, she does not want to testify. They were not
8 given contact information.

9 The other witnesses they've now
10 identified as alibi witnesses, the majority of them were
11 interviewed by the defense at the time and did not have
12 credible information, any information with facts,
13 anything that was usable or not based off of hearsay.
14 And all of that is supported by the affidavits of
15 Mr. Godinich and Mr. Nunnery as well as these e-mails
16 from back then.

17 Just to briefly summarize some of the
18 points that are made in Mr. Godinich and Mr. Nunnery's
19 affidavits --

20 THE COURT: He likes you to say
21 "God-nich."

22 MS. HUTCHINS: Godinich.

23 THE COURT: Not T; "God."

24 MS. HUTCHINS: Godinich.

25 THE COURT: Kind of a joke.

EXH C

. 02155

Writ Hearing
August 17, 2017

1 MS. HUTCHINS: Which basically the
2 affidavit reinforces the information that the family --
3 the information contained in those contemporaneous
4 e-mails, the family and the defendant did not provide
5 the alibi information; that they interviewed various
6 witnesses the defense now identifies as having not been
7 interviewed or not been given a chance; that the
8 defendant's girlfriend actually did not want to testify
9 at trial because she wanted to watch the trial; that it
10 was strategy for them not to call the defendant's
11 brother because they did not feel he would be credible
12 due to his criminal history, his relationship with the
13 gang, his relationship with the defendant, the various
14 photographs that were found of him during the discovery
15 period --

16 THE COURT: Is his brother here?

17 MS. HUTCHINS: And ultimately, he was
18 ordered to leave the courtroom during trial because he
19 couldn't control himself.

20 Some of the information they say that
21 defense counsel would have learned through an
22 investigation, they say in the affidavits they already
23 knew that. It was nothing that they found to be useful
24 or that they could use in a admissible way, it was
25 through hearsay or innuendo; and that the defendant

EXH C

. 02154

Writ Hearing
August 17, 2017

1 himself did not want to testify, so some of the
2 information could not come out.

3 Mr. Nunnery also purports that they spoke
4 to whoever would speak to them, either themselves,
5 through their investigators, their defense team. At
6 trial, trial counsel put on a witness, Walter Benitez;
7 and he provided evidence of -- as evidence of the
8 defendant's innocence of the guilt -- of the capital
9 that was charged. Mr. Benitez provided testimony of an
10 alternate shooter; he provided testimony of Israel
11 Diaz's motives against the complainant, talking about
12 the meeting that was called, that Mr. Diaz wanted the
13 complainant's death, and as well as the motives for
14 Mr. Diaz testifying. Mr. -- interestingly, Mr. Godinich
15 states in his affidavit as well that when Mr. Benitez --
16 since I was not there, I could not see it; I don't think
17 counsel was there either. Mr. Benitez, when he
18 testified, flashed a gang sign for the LTC gang during
19 guilt/innocence and that the defendant in trial
20 responded and that they were told this by the jurors
21 when they spoke to the jurors after trial and that that
22 was probably what did it in for Mr. Benitez and his
23 credibility when he testified.

24 The record shows that much of the
25 proposed testimony, the applicant now says defense would

EXH C

. 02135

Writ Hearing
August 17, 2017

1 have learned through what they characterize as a
2 reasonable investigation was known, was presented, was
3 just presented through other witnesses, for example,
4 Karen Bardales, Israel Diaz, and Wendy Bardales. They
5 wanted to call a witness, Celeste Munoz, at
6 guilt/innocence to testify to some of this information.
7 They were told if they did, it would open the door to an
8 extraneous.

9 Speaking of extraneous, I don't have
10 the record in front of me but I would like to
11 respectfully disagree with defense counsel's
12 characterization of the Court's ruling regarding
13 Mr. Malpass. I believe the Court ruled that he could
14 testify; he could not give an ultimate opinion about
15 Wendy's accuracy but that he would be allowed to
16 testify. There was no ruling as to whether or not it
17 would open the door to other extraneous. The trial
18 attorneys give an affidavit saying that when they spoke
19 amongst themselves as well as their appellate counsel,
20 they believed that it would open the door to an
21 extraneous offense, which was not in the defendant's
22 best interest.

23 THE COURT: Trial strategy.

24 MS. HUTCHINS: Trial strategy, yes,
25 Judge.

Writ Hearing
August 17, 2017

1 And as to the issue of Mr. Shearer,
2 defense is saying that -- I guess now saying that
3 Mr. Shearer should have investigated juror misconduct as
4 a ground for a motion for new trial. However --

5 THE COURT: When did he come onto the
6 case?

7 MS. HUTCHINS: I'm not sure when he came
8 on. He was there during trial sort of as an appellate
9 resource.

10 THE COURT: I see.

11 MS. HUTCHINS: However, they have not
12 filed the claim as an ineffective assistance of
13 appellate counsel; they've done it as an ineffective
14 assistance of counsel. Even still, their argument that
15 he should have investigated juror misconduct as a motion
16 for new trial, now that we have the direct appeal and
17 the CCA's ruling, we know that the CCA found there was
18 no juror misconduct that denied him a right. So that
19 issue, at the end of the day, they don't establish harm
20 on it. So, our argument is that issue goes away right
21 there.

22 And I think -- sorry. I know it's long.
23 There's just a lot to cover.

24 THE COURT: I'm not limiting you.

25 MS. HUTCHINS: That's it, Judge.

EXH C

. 02157

Writ Hearing
August 17, 2017

1 THE COURT: You want to continue?

2 MS. ECKHOFF: I will just point to the
3 issue of whether -- what the Court's ruling was on
4 Dr. Malpass. If you look at Volume 25 of the reporter's
5 record at 179 and again in the Volume 29 of the record,
6 at 14, she discusses both of those -- those -- in both
7 of those cases. One is her actual ruling on
8 Dr. Malpass, that's the 25th Volume. The 29th Volume,
9 if I remember correctly, was actually when she was doing
10 the hearing on Celeste Munoz, the witness that
11 Ms. Hutchins mentioned, and where she clarified at that
12 point that Dr. Malpass could -- where Celeste Munoz
13 would open the door, that Dr. Malpass would not.

14 MS. HUTCHINS: Judge, I just want to
15 clarify one thing. The direct appeal -- on direct
16 appeal, the majority opinion from the Court actually
17 found that the pretrial lineup and the in-court
18 identification were not impermissibly suggestive. It
19 was dissenting opinions.

20 THE COURT: Was that from the CCA?

21 MS. HUTCHINS: Yes, Judge. They found
22 that the witness identifications were not impermissibly
23 suggestive. Defense counsel was talking about the
24 opinion from the dissent that did think it was
25 impermissibly suggestive. Also --

EXH C

. 02158

Writ Hearing
August 17, 2017

1 THE COURT: Let me -- I remember Joe
2 Kegans saying she didn't care one bit about the Court of
3 Appeals. She only cared about the Court of Criminal
4 Appeals. She was a judge down here. And it's the same
5 thing. I don't care about the dissenting opinion. I
6 care only about the majority opinion. So I think it's
7 disingenuous to cite the minority opinion. Let's -- you
8 know, I'm just trying to tell you what I'm thinking.

9 MS. ECKHOFF: If I may clarify, please?
10 I said a majority said that the lineup was suggestive.
11 I didn't say that the majority said it was impermissibly
12 suggestive. I apologize if I didn't make that clear.

13 THE COURT: I appreciate it.
14 Any further rebuttal?

15 MS. HUTCHINS: I did, but I can't think
16 of it, so it's okay.

17 MS. ECKHOFF: Regarding all of the things
18 that Ms. Hutchins just reviewed, I would just like to
19 reiterate the point that these are factual disputes that
20 require fact finding. That is exactly why we're
21 requesting an evidentiary hearing where we have subpoena
22 powers to further explore these representations that are
23 being made by trial counsel as to what happened, or what
24 they say happened, and that all -- many of the things
25 that she cited and attributed to obviously Mr. Godinich

EXH C

. 02135

Writ Hearing
August 17, 2017

1 and Mr. Nunnery's responses to these claims are
2 information that we got last night and that's why we're
3 asking for additional time to more thoroughly review
4 them and address and respond to them.

5 She did mention a couple of things that I
6 wanted to point out is that problems that we do and have
7 spotted with those affidavits that kind of come up
8 nicely here is that one issue is that trial counsel in
9 their affidavits purport to speak on behalf of other
10 members of the trial team. And that wouldn't be proper.
11 For example, on, I believe, it was page 2 of at least
12 the copy that I have reviewed, Mr. Godinich says that
13 neither he nor 12 other members of the trial team that
14 he lists by name had whatever information he was
15 discussing at that point. And so, he's purporting to
16 answer not only on his behalf but on behalf of all those
17 other people.

18 And then, additionally, Ms. Hutchins
19 mentioned, for example, the -- their claim that the
20 jurors said that they saw Mr. Benitez throw a gang sign
21 in the course of his testimony, that's hearsay in this
22 affidavit.

23 THE COURT: You have plenty of hearsay
24 affidavits as well.

25 MS. ECKHOFF: Your Honor --

EXH C

. 02150

Writ Hearing
August 17, 2017

1 THE COURT: Don't you?

2 MS. ECKHOFF: We have one hearsay
3 affidavit, which we acknowledge is hearsay.

4 THE COURT: Okay.

5 MS. ECKHOFF: But again, we're saying
6 that that just makes the case that further fact finding
7 is necessary. We're not asking Your Honor to make a
8 decision based solely on our affidavit. We want to get
9 that witness in here to talk and speak for himself. In
10 this case, you know, Mr. Godinich is saying that
11 Mr. Shearer told him that something the jurors told
12 Mr. Shearer. I mean, at that point you're talking
13 hearsay upon hearsay. It wouldn't presumably be
14 admissible at trial and it shouldn't be admissible as
15 evidence in an affidavit.

16 THE COURT: I think it's just anecdotal.
17 So, all right. Do you want to go into the
18 post-conviction errors that you're alleging?

19 MS. ECKHOFF: The punishment phase?

20 THE COURT: Yes.

21 MS. ECKHOFF: Yes. Sure.

22 THE COURT: I think we should put them
23 all out here on the record and let Ms. Farnaz respond.

24 MS. ECKHOFF: I will try to at least
25 discuss the ones that we would like further factual

EXH C

. 02151

Writ Hearing
August 17, 2017

1 development.

2 THE COURT: Well, I think you should hit
3 your strongest ones right now. This might be your only
4 hearing that you will have. So I think you should hit
5 the very strongest points you have right now.

6 MS. ECKHOFF: Okay. Thank you, Your
7 Honor.

8 THE COURT: And I'll give you as much
9 time as you need. We can be here until 5:00; it's only
10 2:00 o'clock. You'll miss rush-hour traffic on 360
11 going back.

12 MS. ECKHOFF: I would appreciate that.
13 Your Honor, the claim in the punishment
14 phase is that, again, the trial counsel did not conduct
15 a reasonable investigation to develop facts, additional
16 facts, that they could have put on the record regarding
17 Mr. Balderas' social history, which is an important
18 piece of miti -- of punishment phase case and the --
19 including additional testimony from witnesses that they
20 did present but also testimony from those that he did
21 not, regarding aspects of, you know, him growing up and
22 the effects that that would have had on him.

23 One important claim that we made, too --
24 and it's fashioned a little funny because of the nature
25 of an ineffective assistance of counsel claim -- a

EXH C

. 02162

Writ Hearing
August 17, 2017

1 failure of the trial counsel to object when -- so in the
2 course of the punishment phase proceedings, they
3 presented evidence from experts regarding Mr. Balderas'
4 sexual abuse as a young child to -- and the experts were
5 there to explain the effects that growing up subjected
6 to such sexual abuse could have, the effects that that
7 could have on a young boy. And in the course of the
8 cross-examination of those experts, the State made some
9 statements -- and, you know, I don't remember exactly
10 how they were worded at this point; they're described in
11 the application -- that insinuated that the jury should
12 doubt the experts' opinions and reports because the jury
13 wasn't hearing about these abuse allegations from
14 Mr. Balderas himself but rather from experts. And we
15 make a claim that that is a violation of Mr. Balderas'
16 Fifth Amendment right not to testify and kind of
17 highlighting for the jury that they're not hearing this
18 from the defendant himself but rather from experts on
19 his behalf. And the State then reiterated during their
20 closing argument at punishment, came back to that issue
21 and highlighted it again for the jury.

22 THE COURT: And if he were to testify,
23 those 88 extraneouses might have come in.

24 MS. ECKHOFF: Your Honor, this was at the
25 punishment phase where a number of those extraneouses

EXH C

. 02165

Writ Hearing
August 17, 2017

1 did come in because --

2 THE COURT: This is trial strategy on the
3 attorneys' part. So you may continue.

4 MS. ECKHOFF: In terms of the punishment
5 phase, I believe that that is it. Yeah.

6 THE COURT: You would like her to respond
7 now?

8 MS. ECKHOFF: Yes, Judge.

9 MS. HUTCHINS: Judge, the record shows
10 that the defense in this case, they put on just as much
11 punishment evidence as the State did. They put on 18
12 witnesses, put on extensive mitigation evidence, and
13 actually presented much of the exact same evidence that
14 the defendant now claims was lacking. They just put it
15 on through different witnesses that he now says he would
16 have preferred other witnesses. They were able to put
17 on testimony of -- and this is according to the record
18 as well as to the trial counsels' affidavits. They
19 presented all the available mitigation. Other than what
20 they presented at trial, they were unaware of any other
21 evidence that was going to rebut the extraneouses.

22 To rebut the extraneouses, they
23 cross-examined those witnesses but they used seven
24 mitigation experts, four experts and a reverend. The
25 mitigation experts traveled to New York and Mexico to do

EXH C

. 02164

Writ Hearing
August 17, 2017

1 their investigation. They made strategic decisions to
2 present the evidence and the experts as they did,
3 feeling it was done in the best light possible. They
4 investigated and presented evidence of the defendant's
5 childhood, his family history of mental illness. I
6 believe that in the State's answer there are at least
7 10, 15 pages which go through all the evidence that was
8 presented by the defense on these points during
9 punishment phase.

10 They investigated and presented witnesses
11 that testified to his positive character, his role as a
12 protector. They attempted to investigate his attempted
13 disassociation from the gang; but other than the
14 applicant, there was no evidence of that. They
15 presented his juvenile caseworker, family, friends, a
16 Harris County Jail guard, they presented evidence of his
17 childhood abuse, his unstable mother.

18 As to the issue of the alleged comment on
19 the defendant's failure to testify, as explained in the
20 State's answer, the State cross-examined these expert
21 witnesses on the points that these expert witnesses
22 testified that they spoke to the applicant, they
23 interviewed him multiple times; yet they didn't have any
24 notes of any of their interviews with the applicants.
25 They didn't make any recordings, any videos, and so

EXH C

.02155

Writ Hearing
August 17, 2017

1 these experts came to court basically testifying off the
2 top of their heads about each and every meeting they had
3 and their beliefs and their reactions to the physical
4 reactions that the defendant was having.

5 And so, the State was cross-examining
6 these experts on their ability to come in here and give
7 this testimony without having any sort of documentation
8 to that effect and were asking the experts, well, don't
9 you think it would have been useful or helpful to make
10 these notes or to have these videos or to have these
11 recordings and you certainly know that if you had made
12 them, they would be discoverable to us and the defense
13 experts were agreeing.

14 And so, when looked at the entirety of
15 the context of the cross-examination as well as the
16 argument, the State's argument is not that it's the
17 applicant's failure to testify. It's the fact that the
18 information that these experts were testifying to was
19 coming from a single source, the applicant, who had all
20 of the motive and bias to say these things, and that the
21 jury should rely on the credibility of these witnesses
22 without the witnesses having anything to justify or back
23 up what they were purporting to the jury. And so, in
24 the defense attorneys' affidavits, they actually address
25 these issues and say we thought these were valid points

EXH C

. 02155

Writ Hearing
August 17, 2017

1 for the prosecutor to make, thought they were fair. We
2 didn't think they were worthy of objection and to that
3 end, these are record claims and they weren't objected
4 to at trial and so, now they're procedurally barred as
5 well. But there were strategic reasons for not
6 objecting to them.

7 And I don't know if there were issues --
8 there were issues raised in the applicant's writ that
9 were not raised right now. I don't know if you were
10 just trying to summarize them succinctly? If you want
11 me to address them, there were a couple of other issues
12 they raised in the punishment phase --

13 THE COURT: You may.

14 MS. HUTCHINS: -- that I have responses
15 to and I could just save my responses and you could make
16 the argument after, if you'd like.

17 MS. ECKHOFF: That sounds fine.

18 MS. HUTCHINS: There was some trouble --
19 there was some witnesses that testified via Skype in
20 this case from Mexico, defense witnesses, from the
21 defendant.

22 THE COURT: During trial?

23 MS. HUTCHINS: During trial.

24 THE COURT: The punishment phase?

25 MS. HUTCHINS: In the punishment phase

EXH C

.02167

Writ Hearing
August 17, 2017

1 the defendant's family members testified from Mexico.
2 In some e-mails that are attached to Mr. Godinich's
3 affidavit and I believe to the defense exhibits as well,
4 it talks about the fact that the defense wanted to
5 actually bring these people over and the defense was
6 going to foot the bill to bring them over but the
7 witnesses couldn't decide amongst themselves who to
8 come. Meanwhile, the defendant's mother was also
9 telling them not to come. And so, ultimately they
10 managed to work out a way for the witnesses to testify
11 via Skype. The defense is able to do cross -- direct
12 examination. The State starts cross-examination and
13 there's technical issues. They switch witnesses, they
14 take some live witnesses in court, they go back to the
15 witnesses in Mexico. There's still technical issues.
16 Ultimately they can't use Skype; they use speakerphone.
17 And so, the defense and the State are questioning here
18 in English, there's a translator who is translating in
19 Mexico as well as the defense mitigation expert.

20 THE COURT: And you have a translator on
21 this end as well.

22 MS. HUTCHINS: Yes. And so, there's a
23 defense mitigation expert actually in Mexico sort of
24 relaying everything also back to the trial team. And
25 from the record, it appears as though the defense and

EXH C

02166

Writ Hearing
August 17, 2017

1 the State were all able to ultimately battle through the
2 technical issues and ask all the questions they wanted,
3 get the answers they wanted. And these witnesses, two
4 of them are able to testify; one of them was not there
5 when he was called to testify.

6 Mr. Godinich's affidavit as well as an
7 attached exhibit actually says that the defense cut
8 their questioning short of these witnesses in Mexico
9 because they found out that the defendant's girlfriend
10 was calling the witnesses in Mexico, telling them to
11 change their answers. And so, the testimony that they
12 were getting from the witnesses in Mexico was not what
13 trial counsel expected to be getting, so he immediately
14 tried to get them off the stand before he was presenting
15 perjured testimony, or what he believed was going to be
16 perjured testimony.

17 THE COURT: Don't react in the audience,
18 ma'am. She's talking about you.

19 MS. HUTCHINS: There was also some issues
20 about Mr. Nunnery's behavior and some comments that he
21 made and whether or not they affected the jury in their
22 deliberations. Some of these alleged comments are -- I
23 guess the comments, these side comments are not on the
24 record. Mr. Nunnery addresses them in his affidavit to
25 the fact that he has no personal recollection, sometimes

EXH C

. 02155

Writ Hearing
August 17, 2017

1 words are exchanged.

2 THE COURT: I read that.

3 MS. HUTCHINS: I'm not sure if he knows
4 if jurors heard him or not.

5 THE COURT: When someone alleged that he
6 called one of the prosecutors the "b" word?

7 MS. HUTCHINS: Correct. And so, the
8 applicant fails to establish that those comments
9 affected the jury deliberation or that they heard it. I
10 know they provided some affidavits from the jurors.
11 Interestingly, I think the juror affidavit --

12 THE COURT: I don't think you have to go
13 there.

14 MS. HUTCHINS: Okay.

15 THE COURT: I'm not considering that. I
16 just want you to realize that happens in every trial.
17 And unless someone came in here and said, I heard him
18 call her the "b" word and it changed my idea of what I
19 wanted to give him for punishment, short of that, let's
20 move on to something germane.

21 You may continue, or do you have more?

22 MS. HUTCHINS: Just briefly, Judge. They
23 criticize his closing argument about that he sort of
24 insulted the jurors and they didn't like the tactic that
25 he took. He addresses that, that he made points that he

EXH C

.02170

Writ Hearing
August 17, 2017

1 thought were valid and he wanted to remind jurors of the
2 oath that they took, to hold to their verdict. And he
3 felt as though it was important and necessary for him to
4 urge that to the jurors. And when looked at in the
5 entirety of his argument, the entirety of his argument
6 supports that he did a very thorough closing argument
7 and summation of the evidence.

8 THE COURT: Yes, ma'am.

9 MS. ECKHOFF: Your Honor, I would just
10 point out again that these are factual disputes that we
11 would like to delve into at a hearing.

12 THE COURT: I'm not going to let you go
13 into that one, I'm telling you there. That's just
14 malarkey, if you ask me. Let's go to something germane.

15 MS. ECKHOFF: Your Honor, I'm not -- I
16 appreciate that you're giving us the opportunity to go
17 into -- the remaining ineffective assistance counsel
18 claims, I will admit at this moment, are not nearly as
19 fresh in my memory as these.

20 THE COURT: That's okay. You have as
21 much time here as you need.

22 MS. ECKHOFF: Okay.

23 THE COURT: And take your time. I'm not
24 hurrying you.

25 MS. ECKHOFF: Thank you. We raise in

EXH C

. 02171

Writ Hearing
August 17, 2017

1 claim -- a claim of ineffective assistance of counsel
2 pretrial for failing to assert speedy trial at a time
3 where it would actually be considered. In this case the
4 defendant himself made a pro se motion for a speedy
5 trial.

6 THE COURT: Do we have speedy trial in
7 Texas anymore? I don't think we do. So do you have a
8 statute that you can cite that shows that we had a
9 speedy trial provision here?

10 MS. ECKHOFF: If you would allow us to --

11 THE COURT: Well, I mean, you're bringing
12 up speedy trial as in your appointed error in
13 punishment, do we have it? I mean, I don't believe --
14 as a sitting district judge, I don't believe we have
15 speedy trial.

16 MS. HUTCHINS: Judge, after -- I believe
17 what the standard is that after about a year, the
18 defense can raise speedy trial and then there are four
19 factors that the Court uses to weigh whether or not
20 there's been a violation. And I believe the remedy is
21 if there has been a violation, then you get your trial.
22 But if not, then I believe the case is permitted to
23 proceed as sort of -- as it's going forward.

24 THE COURT: I just mean -- you may
25 continue.

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: And, Your Honor, there was
2 a claim that was raised on our end as a constitutional
3 claim, it's the Sixth Amendment right to a speedy trial
4 that applies to the states via the Fourteenth Amendment.
5 And in considering the pro se motion for speedy trial
6 that was raised, the Trial Court did consider the
7 factors as laid out in *Barker v. Wingo*; it's a Supreme
8 Court case regarding a speedy trial. The reason that
9 the speedy trial motion was denied was because voir dire
10 had already begun and that was the basis of the denial.

11 Our allegation is that that's a claim
12 that should have been raised before even getting to jury
13 selection.

14 MS. HUTCHINS: Briefly, Judge.

15 THE COURT: Yes.

16 MS. HUTCHINS: Judge, during the speedy
17 trial motion, the -- Spence Graham testified in the
18 hearing as to the voluminous nature of the case, all the
19 extraneous, the fact that the defense was putting
20 together mitigation packets to try to persuade the
21 applicant to take a life offer, that the applicant keeps
22 picking up offenses in jail. It took six years for the
23 State to make a decision whether or not to pursue it as
24 a death case. So these were all the factors that were
25 going on during the pendency of the case, as well as

EXH C

. 02173

Writ Hearing
August 17, 2017

1 just the changeover in not only the judges but also the
2 prosecutors handling the case and whatnot.

3 The issue was raised on direct appeal and
4 on direct appeal, the applicant argued the Trial Court
5 erred in overruling the motion for speedy trial. The
6 Court of Criminal Appeals said, no, there was no error,
7 the Trial Court was within its right and was correct in
8 denying it.

9 When we look at the affidavits of
10 Mr. Godinich and Mr. Nunnery, we get some insight into
11 the defense and that they had strategic reasons for the
12 delay. The applicant actually never expressed a desire
13 for a speedy trial until the eve of trial when he filed
14 his pro se one. The affidavits address the abundance of
15 the evidence, the time needed to investigate his new law
16 violation, the applicant -- the defendant never objected
17 to a reset or a continuance. And I believe it's
18 Mr. Nunnery who says that they filed the speedy trial
19 motion to preserve his appellate rights on the issue but
20 there were no unavailable witnesses or missing witnesses
21 that they would have called or that would have hindered
22 their defense because of this delay. But they filed the
23 motion anyway, to preserve his rights.

24 THE COURT: Okay.

25 MS. ECKHOFF: Just a point on that, Your

EXH C

. 02174

Writ Hearing
August 17, 2017

1 Honor. I'm going back to something she said before. I
2 would just want to point out in raising these claims, we
3 filed this initial application before any decision on
4 direct appeal is made by the CCA. It's just how it
5 works. Like, we have to raise all of these claims and
6 we will continue to raise them, even though they're also
7 raised on direct appeal because it's our responsibility
8 to preserve --

9 THE COURT: And you may drop some of
10 them.

11 MS. ECKHOFF: Your Honor, we don't
12 drop -- I respectfully disagree. We need to preserve
13 the record for further review up the chain, too --

14 THE COURT: Okay.

15 MS. ECKHOFF: -- and in federal court, if
16 we get there.

17 THE COURT: Okay. I gotcha.

18 MS. ECKHOFF: So, no, we are not going to
19 drop any of these claims. We are preserving them for
20 the future.

21 THE COURT: Okay.

22 MS. ECKHOFF: And we also, again, assert
23 that further factual development is needed on these
24 factual disputes.

25 If I could have a moment?

EXH C

. 02175

Writ Hearing
August 17, 2017

1 THE COURT: You may.

2 MS. ECKHOFF: Thank you. Your Honor,
3 would it be all right if we speak with our client?

4 THE COURT: Sure. Let's take a break for
5 a moment.

6 (Recess taken.)

7 THE COURT: Are we ready to start?

8 MS. ECKHOFF: Yes, Your Honor. I believe
9 the final IAC claim that we had raised pertained to the
10 jury selection phase of trial where we raised a claim
11 that trial counsel did not adequately account for their
12 mitigation case in their jury selection and therefore,
13 because they did not explore these issues that they knew
14 would be developed and presented in the punishment
15 phase, didn't explore how potential jurors would
16 actually react and consider those claims, specifically
17 in this case, the sexual abuse of small children.
18 And --

19 THE COURT: Are you talking about the
20 episode when he's 8 years old and Mr. Hernandez touches
21 him?

22 MS. ECKHOFF: I believe it was more than
23 just touching, Your Honor; but, yes, and it was over the
24 course of, I believe, five years that he was pretty
25 repeatedly and regularly sexually assaulted by his

EXH C

. 02176

Writ Hearing
August 17, 2017

1 stepfather.

2 THE COURT: Is that Mr. Hernandez?

3 MS. ECKHOFF: I believe.

4 THE COURT: Eleazar Hernandez?

5 MS. ECKHOFF: Yes, that is correct, Your
6 Honor. And so, that's the claim that we've made in jury
7 selection. You know, the ABA guidelines that dictate
8 what is reasonable performance in capital cases make
9 clear that you need to approach the entire trial
10 including jury selection with your punishment phase in
11 mind and in selecting your jury. And we just made a
12 claim that they didn't do that as they're required to
13 under the ABA guidelines.

14 MS. HUTCHINS: Judge, under prevailing
15 case law, trial counsel was not ineffective for not
16 attempting during voir dire to improperly bind the
17 prospective jurors as to whether they would specifically
18 consider sexual abuse as mitigating evidence. Case law
19 says that trying to lock the jurors in on a specific
20 "this set of circumstances is mitigating" is improper
21 jury selection.

22 THE COURT: Yes, I would agree.

23 MS. HUTCHINS: So Mr. Nunnery's affidavit
24 addresses that and addresses that because of their
25 understanding of the case law, they voir dired on

EXH C

.02177

Writ Hearing
August 17, 2017

1 mitigation globally but not specific types of mitigation
2 and appropriately considered jurors who could give
3 weight to mitigation in general.

4 Mr. Godinich's affidavit also supports
5 that their method of jury selection, the Colorado
6 Method -- I did a little bit of research into it because
7 I wasn't familiar off the top of my head with it --
8 focuses on the issue of whether jurors would give life
9 or death and if they can appropriately consider
10 mitigation. And so, when you look at their affidavits
11 in conjunction with their approach to voir dire, you see
12 that the defense addressed the issues that the State
13 raises, they addressed issues on the questionnaires,
14 they address both special issues and mitigation, which
15 is absolutely reasonable strategy on their end.

16 And in addition -- so all of that goes to
17 show there was not a lack of deficient conduct but also
18 that there was no harm because the trial court gave the
19 jury specific instructions throughout trial and also
20 with the punishment charge to consider the totality of
21 the evidence in their deliberations and on the special
22 issues and that they need not agree on what evidence
23 constitutes mitigation. And so, when you look at it
24 even under the realm of *Strickland*, they don't meet
25 either prong of *Strickland*.

EXH C

. 02176

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: Just as a point of
2 clarification, I agree that it is improper in jury
3 selection to pin a potential juror down on what they
4 would or would not consider mitigation. However, trial
5 counsel is entitled to explore potential mitigation with
6 them to gauge their reaction and respond to their views
7 of those issues without asking them would you find this
8 mitigating or not.

9 THE COURT: I'm giving you the right to
10 first present, then she rebuts, then I'm letting you
11 rebut even again. So I'm giving you more than I'm
12 giving the State at this time.

13 MS. ECKHOFF: I appreciate that. Thank
14 you. And I'm happy, if she would also like to respond,
15 I'm more than --

16 THE COURT: No, I'm going to limit them.
17 But I'm trying to give you as much time as you need.

18 MS. ECKHOFF: Thank you. A claim that I
19 think I inadvertently skipped over at one point is Claim
20 7 and that was a claim that the State relied on false
21 testimony at the punishment phase when a State's
22 witness, who was a corrections officer here, Harris
23 County, testified that he had essentially been
24 exonerated from some of the charges that had been
25 brought against him, like internal personnel charges.

EXH C

02175

Writ Hearing
August 17, 2017

1 He had been terminated as a corrections officer as a
2 result of an incident that occurred and in his
3 testimony, he indicated that he had been cleared of
4 those charges. That's not exactly -- a review of his
5 personnel file shows that that's not actually the case.
6 The charges stood. They modified his punishment. So
7 there's a claim that that testimony that he was cleared
8 of the charges was false. And --

9 THE COURT: Okay.

10 MS. HUTCHINS: Judge, the standard there
11 is whether the testimony in its entirety left a false
12 impression with the jury. This particular witness, I
13 believe, testified about a weapon that he found in the
14 applicant's cell, if I'm not mistaken.

15 MS. ECKHOFF: I don't believe it was a
16 weapon. I can double-check. I believe it may have been
17 some other contraband.

18 MS. HUTCHINS: It was contraband. I'm
19 sorry. In my head contraband equals weapon. There was
20 contraband in his cell and he testified about the
21 contraband. However, on cross-examination the defense
22 elicited that he was terminated from the sheriff's
23 office for a violation of policies that involved the
24 death of an inmate. He testified it was about a round
25 sheet, which is a sheet that they use to document things

EXH C

. 02150

Writ Hearing
August 17, 2017

1 in the sheriff's office; for a failure to render aid and
2 deception. And on redirect he testified that he was
3 cleared of wrongdoing and he is eligible for rehire
4 after 75 days.

5 When looking at the entirety of his
6 testimony and then you compare it to the applicant's own
7 exhibits, which they've attached as 70, 71, and 72, his
8 termination letter, his separation from the sheriff's
9 office, and then his reinstatement with the sheriff's
10 office, there's no false impression, our argument, that
11 was left with the jury.

12 Also, when -- you have to assess the
13 materiality of this witness' testimony when examining
14 false testimony. It's not only was the testimony false,
15 which we argue that it wasn't, but was it material. And
16 when you look at this one witness' testimony about
17 contraband found in his cell, in the greater context of
18 all of the punishment evidence against him, the
19 additional murders, the additional aggravated assaults,
20 in and out of custody, his juvenile history, we argue
21 that it was not material. And so, based off of all of
22 that and the prevailing law, we believe that their issue
23 is resolvable.

24 THE COURT: You may continue.

25 MS. ECKHOFF: Your Honor, I believe that

EXH C

.02151

Writ Hearing
August 17, 2017

1 the remaining claims are legal in nature and they're not
2 claims that we would be seeking additional fact finding
3 on. There are claims that are made to preserve the
4 record going forward and I would just refer to our
5 arguments in the --

6 THE COURT: Would you just state them and
7 put them in the record?

8 MS. ECKHOFF: The names of the claims?

9 THE COURT: Yes.

10 MS. ECKHOFF: Okay. It's Claim 10, is
11 the agreement between the State and the defense to
12 exclude African-Americans from Mr. Balderas' jury
13 violated the equal protection clause of the Fourteenth
14 Amendment.

15 Claim 11: Mr. Balderas' death sentence
16 violates the equal protection due process in cruel and
17 unusual punishment clauses of the United States
18 constitution.

19 Mr. Balderas -- Claim 12: Mr. Balderas'
20 constitutional rights were violated when the Trial Court
21 was prohibited from instructing the jury that a vote by
22 one juror could result in a life sentence.

23 Claim 13 --

24 THE COURT: And who made that statement,
25 you're saying?

EXH C

. 02182

Writ Hearing
August 17, 2017

1 MS. ECKHOFF: On -- that the Trial Court
2 was prohibited -- are you talking about instructing the
3 jury that a vote --

4 THE COURT: No -- yes. Go ahead with
5 that one.

6 MS. ECKHOFF: With that one --

7 THE COURT: Who was reported to have said
8 that?

9 MS. HUTCHINS: It's just a standard jury
10 instruction.

11 THE COURT: Oh, I thought that you were
12 saying that somebody made that statement in open court.

13 MS. HUTCHINS: Oh. They did. Actually
14 Mr. Nunnery, even though he was prohibited from doing
15 so, actually told the jury in closing argument that one
16 vote equals a life sentence.

17 THE COURT: That's what I wanted to hear.

18 MS. ECKHOFF: Okay.

19 THE COURT: Did you know that?

20 MS. ECKHOFF: That that occurred?

21 THE COURT: Yes.

22 MS. ECKHOFF: Yes, but the jury -- you
23 know, presumably jurors follow the instructions that
24 they're given by the Court. And it's a pretty standard
25 challenge to the statutory prescribed instruction.

EXH C

. 02185

Writ Hearing
August 17, 2017

1 Claim 13: Mr. Balderas' death sentence
2 was arbitrarily and capriciously assigned based on the
3 jury's answer to the unconstitutionally vague first and
4 special issue.

5 Claim 14: Mr. Balderas' death sentence
6 should be vacated because the punishment phase jury
7 instruction restricted the evidence that the jury could
8 determine was mitigating. Again, those are all legal
9 claims that are -- a case for those is made in the
10 application and we agree that no further fact finding on
11 those is necessary.

12 THE COURT: Anything?

13 MS. HUTCHINS: I mean, our response on
14 No. 10, the affidavits, not only the ones attached to
15 the State's answers, show that no juror was excluded or
16 potential juror was excluded based off of race.
17 Everything was done, on the defense end, pursuant to
18 strategy. And that, I guess, at some point the
19 applicant actually raises that they object because -- or
20 they're upset --

21 THE COURT: There was no *Batson* challenge
22 anywhere here, right?

23 MS. HUTCHINS: No. There were
24 prospective jurors who were released based off of their
25 answers to the questionnaire. Now he's upset because he

EXH C

Writ Hearing
August 17, 2017

1 argues the majority of them were minorities, and so
2 there's affidavits from the State saying anybody who was
3 excused was not excused based off of race. That's
4 consistent with the State's affidavit as well as the
5 defense affidavit..

6 The defense affidavit actually -- I
7 believe it's Mr. Nunnery's -- goes into detail and says
8 that with these types of cases, you have one eye down
9 the line. You're looking at what juror's coming up and
10 so you have to make a strategic decision as to is this
11 juror better or worse than the one that's coming down
12 the line. So in those situations, they would agree to
13 dismiss jurors based off of potentially somebody more
14 favorable coming down the line, and that anybody that
15 was dismissed -- agreed to be dismissed by the defense
16 was discussed with Mr. Balderas. Mr. Balderas had no
17 issue with it. Trial counsel explained all their
18 reasons. And for every single juror that was dismissed
19 by agreement, the judge actually asked the defendant
20 whether it was his agreement and the defendant agreed
21 that it was his agreement. And so, the defense --
22 Mr. Nunnery explains in his affidavit that he didn't
23 believe it was necessary to then further on the record
24 explain the inner workings of his conversation and his
25 advice to the defendant on the record. It was

EXH C

.02185

Writ Hearing
August 17, 2017

1 sufficient for them to say that, yes, the defendant knew
2 and the defendant agreed. That's Ground No. 10.

3 Grounds No. 11 through 14, all of these
4 were raised by the defense pretrial in a pretrial
5 motion. They were all overruled by the Trial Court.
6 Because they were previously raised and overruled by the
7 Court, under the prevailing case law, the defendant is
8 now procedurally barred from raising them in a
9 post-conviction writ application. Despite the bar, in
10 our answer we go through and we give additional reasons
11 as to why those claims don't have any merit. And so, I
12 can just rely on what we have in the State's answer.

13 THE COURT: Okay.

14 MS. ECKHOFF: Your Honor, if you don't
15 mind, at this point I would like to hand it off to
16 Ms. Black to preserve my voice.

17 THE COURT: Pull up a chair.

18 MS. BLACK: Your Honor, just to return to
19 our prior primary concern today. When we came here, the
20 previous -- the Court previously had made a decision
21 that there was a need for further factual development in
22 this case on issues of ineffective assistance of counsel
23 that we've gone into some depth about today. We came
24 here today to argue that there were actually other
25 issues raised in the petition that require further

Writ Hearing
August 17, 2017

1 factual development.

2 And to go back to a point that the
3 district attorney made earlier, this is really -- the
4 Article 11.071 contemplates different ways of assisting
5 this Court in making factual findings. The pleadings --
6 we're at the pleading stage; we feel we've alleged facts
7 which if we were given the opportunity to come into
8 court and prove, we could prove would entitle
9 Mr. Balderas to relief. We came here to ask the Court
10 to take a closer look at some of these claims that
11 require further factual development.

12 THE COURT: Well, then, please --

13 MS. BLACK: The ineffective assistance of
14 counsel claims were the claims that the Court previously
15 had deemed where further factual development was
16 necessary but in fact, had deemed that that could be
17 accomplished by the use of affidavits. Now, our
18 position then and it's our position now that affidavits
19 are not a reliable substitute for a -- live testimony in
20 court, at which this Court can assess the credibility
21 and the demeanor of witnesses as opposed to on paper.

22 But an additional point I'd like to make
23 is that there was an order for these affidavits and then
24 there was a long, long delay and the information, a lot
25 of the facts, which the State is relying on to rebut our

EXH C

02187

Writ Hearing
August 17, 2017

1 claims in this hearing today, came to light, basically,
2 within the last 24 hours. And it would be -- the Court
3 previously, the prior Court had deemed that there was a
4 need to go into further detail on these claims of
5 ineffective assistance of counsel and in fact, to hear
6 from the witnesses and if provided, for affidavits to be
7 an initial way of doing that. We would ask for an
8 opportunity to respond with more than 24 hours' notice
9 to the factual allegations that were submitted in these
10 affidavits that hadn't even been served on us --

11 THE COURT: Can we enumerate those for
12 the record, those that you're talking about again, or
13 are they just the same ones she's already stated?

14 MS. BLACK: We did the best we could in
15 standing here today, basically, doing it in the form of
16 an ad hoc argument. But what we'd like the opportunity
17 to do is take those affidavits --

18 THE COURT: I understand.

19 MS. BLACK: -- back to our office to look
20 at them carefully and to raise -- to file -- a motion
21 has been filed. If this is, in fact, a hearing on that
22 motion, we would like for the opportunity to oppose the
23 motion in writing because a written motion was filed
24 with numerous allegations made in the form of these
25 lengthy affidavits and we feel we deserve, and due

EXH C

. 02188

Writ Hearing
August 17, 2017

1 process requires, that we be entitled to take those
2 affidavits, to study them, and to respond in the same
3 form, in writing, in a written opposition to that motion
4 before this Court takes that motion under advisement.

5 And if that -- you know, what we've
6 attempted to do today is, through a quick reading of
7 affidavits, to point out that there are still -- that,
8 in fact, they raise what -- what the Court is charged
9 with doing in designating issues for factual development
10 is deciding whether there's controverted issues of fact.
11 Are there things where we've raised a claim and the
12 State has disputed the claim and it can't -- there's a
13 factual issue that needs to be resolved. So those facts
14 were -- those disputed issues were found by the prior
15 Court to exist with respect to our ineffective
16 assistance of counsel claim and we would argue that due
17 process requires that --

18 THE COURT: Do you have her ruling in
19 writing somewhere?

20 MS. HUTCHINS: Judge, the -- I don't have
21 a copy with me. There should be a copy in the file.

22 THE COURT: So what does it say? If you
23 look at it, what does Judge Guiney say?

24 MS. HUTCHINS: It's an order designating
25 issue and what it does is, basically, it's the Court

Writ Hearing
August 17, 2017

1 saying that the Court finds the applicant filed a writ
2 application with these 14 claims and it lists what the
3 14 claims are and then it said in there that the Court
4 has determined that these claims, that it will resolve
5 these claims and it actually says, "some by application
6 of the applicable law, some" -- back up a second.

7 It says that, "The Court would resolve
8 these issues in the manner the Court deemed appropriate,
9 namely, some by the application of applicable law, some
10 by the review of the pleadings, some by the review of
11 the appellate record, some by the review of the
12 affidavits submitted by trial counsel, some by
13 recollection of the Court, and some by a review of the
14 submitted habeas evidence."

15 And so, what it basically says is that
16 the Court is acknowledging that the applicant filed a
17 writ application, these are the 14 grounds, and the
18 Court is going to decide the manner in which it thinks
19 it's appropriate to resolve them. And then the Court
20 issued another order that ordered Mr. Godinich and
21 Mr. Nunnery to do affidavits on these six or seven
22 issues. And that's all that that order said.

23 And what the effect of that order is is
24 it basically stops the clock at the CCA. Otherwise, if
25 we didn't have that order, we would have to do things on

EXH C

. 02150

Writ Hearing
August 17, 2017

1 a much speedier timetable. That's all it does.

2 MS. BLACK: It does a little more than
3 that. It's designating that there is an issue that --
4 and it is providing for factual development of that
5 issue. And these affidavits were contemplated.

6 Now, what we had hoped to convince the
7 Court was that there were -- that in taking a fresh look
8 at this case, there may be other issues that raise
9 controverted issues of fact. Our position is that there
10 are factual issues in several of the claims and most
11 importantly, in the prosecutorial misconduct relating to
12 false testimony, the ineffective assistance of counsel,
13 and the juror misconduct claims. And we urge this Court
14 not to decide them based on the pleadings alone because
15 the burden at the pleading stage is to raise facts
16 which, if proven, would entitle Mr. Balderas to relief.

17 But in the event that we are speaking
18 solely about these ineffective assistance of counsel
19 affidavits, the mode of factual development is
20 inadequate here for several reasons but one of which is
21 that the affidavits are not a good substitute for live
22 testimony and an evidentiary hearing for many of the
23 reasons that we've talked about, which is that many of
24 the statements in the affidavits raise allegations or
25 questions that we would dispute but often in a manner

Writ Hearing
August 17, 2017

1 that would be inadmissible in the context of an
2 evidentiary hearing.

3 And that's also why we, for example,
4 provided a hearsay affidavit in support of our claim,
5 our false testimony claim regarding Israel Diaz; we're
6 asking for further factual development because we don't
7 want to solely rely on the hearsay affidavit. We would
8 like to have access to this Court's subpoena power to
9 prove that claim by bringing the witness into the court
10 where the Court can evaluate the witness' credibility,
11 the demeanor, and both sides have the opportunity to
12 examine and cross-examine the witness and we feel the
13 same thing is appropriate in the context of the
14 ineffective assistance of counsel claims where this
15 process of having an affidavit that's filed five days
16 before we're here in argument and submitted through a
17 motion that was filed only hours ago just really doesn't
18 allow for the full exploration of those issues and
19 doesn't give us adequate time to respond to the -- to
20 the -- to the factual questions that are either answered
21 or raised in that affidavit -- in those affidavits.

22 THE COURT: I think y'all did a fine job
23 presenting and rebutting.

24 MS. BLACK: But we're stuck with what's
25 in the pleadings and what we're asking this Court for is

Writ Hearing
August 17, 2017

1 to allow us to present you with more.

2 THE COURT: Yes. I understand. I
3 understand. You may not get that but what you can do is
4 supplement your responses here today with affidavits or
5 motions or memorandum. I don't know what you're going
6 to use and I will read them as well. And then -- so,
7 you have something today for the first time, these
8 affidavits.

9 MS. BLACK: Well, the motion, could we
10 respond to the motion in writing, I guess. Before the
11 Court rules on the motion, could we file a written
12 opposition? That's --

13 THE COURT: And that's fine. Written
14 opposition, that's fine. I'll read it. Let's keep it
15 not so verbose. Let's keep it at a minimum of what
16 you're going to say and address the most serious issues.
17 I know what you say and you're keeping every one of your
18 options and errors open for federal review as well. But
19 I've already told you what I think about several of your
20 errors that you've raised. So, if you want me to
21 respond to it, I would address those of your strongest
22 errors.

23 MS. BLACK: And we intend to do that
24 and -- and again, this is the difference between where
25 we are now versus where we were at the pleading stage.

EXH C

. 02155

Writ Hearing
August 17, 2017

1 We did come here --

2 THE COURT: I understand. You want a
3 live hearing.

4 MS. BLACK: But it would be relevant to
5 some of the claims and not all of the claims in the
6 petition. There are discrete issues that do require a
7 hearing and where due process does require a hearing but
8 not all of the issues in the petition -- we weren't here
9 to argue all of them, that we would present a hearing on
10 every issue that we made.

11 THE COURT: Well, if that's what you
12 wanted, then you should really pare it down and just use
13 your strongest errors.

14 You didn't talk about the translators and
15 the people on the jury panel that spoke Spanish and
16 contradicted what the translation said it was, or the
17 translator said it was. We've had that happen in court
18 here all the time. I'm not -- they are not trained, no
19 one on the jury is trained to be a translator. The
20 person here is trained and uses that every day. And
21 every day I will go with what the translator says. I
22 don't care what the juror said she thought she
23 understood from the people speaking Spanish. They're
24 not working as a translator down here. We have a
25 translator here. I know all four or five of the

EXH C

. 02184

Writ Hearing
August 17, 2017

1 translators. I speak Spanish and I've corrected the
2 translator myself. But she used a word that was proper
3 enough. So, I'm telling you, I will go with the
4 translator every time.

5 MS. BLACK: We appreciate the Court's
6 advice about paring things down and putting things into
7 a context. And again, this hearing has gone back and
8 forth on almost every issue but I guess if I could tag
9 onto our request for an opportunity to respond in
10 writing in opposition to the motion the State filed
11 today, we would also like to, because this Court is
12 hearing these issues for the first time, file a written
13 motion for a evidentiary hearing on certain issues in
14 the petition but not all of them and perhaps accompany
15 them with affidavits and things to further convince the
16 Court that there is -- there are controverted issues of
17 fact related to --

18 THE COURT: Well, I would pick your
19 strongest ones. I've given you my opinion already just
20 on what I've heard today. Please don't spend your
21 wheels -- spin your wheels on the motel, the person
22 waving, the translator. I know these attorneys, they've
23 practiced before me, I've practiced alongside them for
24 25 years here. And I've appointed Mr. Godinich before,
25 in the past. So, I know that he's a good lawyer.

EXH C

. 02195

Writ Hearing
August 17, 2017

1 There are only -- we have 179 people on
2 the first degree list, 79 people on the second degree
3 list here, and 69 people on the third degree list here.
4 But there are only, what, 40 or 50 people on the capital
5 list. And that's 40 or 50 people out of the thousands
6 that practice at this courthouse a day. They have to
7 take a special CLE course and maintain their CLE on
8 capital writs and capital cases. These attorneys
9 pioneered the way.

10 This county was one of the first and the
11 best counties on requiring proper accreditation for
12 capital crime. This -- I would say I don't know of a
13 county that does a better job than Harris. Do you know
14 of one? And we have the best attorneys that are
15 appointed to capital crime. I only appoint people that
16 have the highest accreditations. So, do you know of a
17 county that does it better than this one? I mean, you
18 practice all over the state, don't you?

19 MS. BLACK: Yes, and as a defense
20 attorney, we deal with issues of ineffective assistance
21 of counsel all the time and in fact, due to recent --
22 well, not that recent but fairly recent supreme court
23 opinions, doing the work that we're doing at the state
24 court level, we'll have other attorneys reviewing our
25 work and raising allegations of ineffective

EXH C

. 02156

Writ Hearing
August 17, 2017

1 assistance --

2 THE COURT: Indeed. Indeed.

3 MS. BLACK: -- and really what we're --
4 you know, our position is that even the best attorneys
5 can make mistakes and this is a capital case, so what
6 we're looking at is raising claims of error and having
7 Courts review the claims of error because of the
8 heightened need to get it right and to not make mistakes
9 in a capital case. So even though it's awkward, raising
10 claims of ineffective assistance of counsel is really a
11 way of saying that even the best counsel can make
12 mistakes and --

13 THE COURT: Indeed.

14 MS. BLACK: -- if those mistakes go to
15 the reliability of the guilt verdict and death sentence,
16 we have an obligation to rectify those errors because of
17 the severity of the punishment.

18 THE COURT: Not every error warrants a
19 reversal.

20 MS. BLACK: That's certainly true.

21 THE COURT: That happens every day. I
22 tell that to appellate attorneys every day that come in
23 here. So is there anything else you would like to put
24 on the record before we adjourn?

25 MS. HUTCHINS: Just on our end, Judge,

EXH C

.02107

Writ Hearing
August 17, 2017

1 that the clerk's office, based off of, I think, the file
2 stamp on them, I just wanted to clarify for the record
3 that Mr. Godinich and Mr. Nunnery filed their affidavits
4 last week and their certificates of service, I believe,
5 saying that they were mailed out by the clerk's office.
6 So I just didn't want the Court to think --

7 THE COURT: Nobody thinks that.

8 MS. HUTCHINS: -- that we were sitting on
9 their affidavits.

10 THE COURT: And they don't think that
11 either. I'm sure it's --

12 MS. BLACK: It's only been a couple of
13 days and we are in Austin, so they are probably in the
14 mail.

15 THE COURT: So, if you want me to grant a
16 hearing on further stuff, then you need to pare it down
17 to just your best arguments and tell me what you want to
18 present, who your witnesses are going to be, and what
19 you think that they might testify to. I mean, so, if
20 you put a little summation on the paragraph and then
21 tell me what you hope to produce by that. And you'll
22 give it to them before they give it to me and I'll have
23 both of your responses.

24 So you get to respond to theirs and
25 they're going to respond to yours right now. So e-mail

EXH C

. 02158

Writ Hearing
August 17, 2017

1 them and then once you both have it and you can both
2 send me your -- I don't know how you'll present it to
3 the Court. Probably it should be in written form for
4 the clerks, not by e-mail.

5 MS. BLACK: Yeah.

6 THE COURT: Again, I'm not guaranteeing
7 anything but don't -- don't throw everything in the
8 kitchen sink at me and expect me to grant you a hearing
9 on that. Pare it down to the best ones that you have
10 and I will look at it.

11 MS. HUTCHINS: Judge, am I correct in my
12 understanding then that you will, once you have their --
13 the defense's objection to our motion and potentially
14 our response from us on their objection, that at that
15 point, once you review it, you will make a decision and
16 you will issue your written order and we will both just
17 get notification of your written order?

18 THE COURT: I think that's so, yes.

19 MS. BLACK: And just to clarify, it would
20 be more of a -- we're kind of talking about two
21 different things but there's an opposition to your
22 motion but we're actually affirmatively moving for
23 something as well.

24 MS. HUTCHINS: No, I understand.

25 THE COURT: Explain that to me so that I

EXH C

. 02155

Writ Hearing
August 17, 2017

1 know what you mean.

2 MS. BLACK: We were hoping to -- when you
3 discussed paring down the issues and attaching the
4 relevant affidavits, that would be more of a motion for
5 an evidentiary hearing than our response to their
6 motion.

7 THE COURT: Yes.

8 MS. BLACK: But it --

9 THE COURT: I don't want to receive a
10 35-page document. Tell me what you want to investigate,
11 tell me who your witnesses are going to be, what you
12 think they're going to proffer, and we'll go from there.
13 Again, I haven't made any promises of what I'm going to
14 do. I don't know.

15 MS. BLACK: Should we set a time frame
16 for the response, for the motion and the response?

17 MS. HUTCHINS: We should.

18 THE COURT: Because the Court of Criminal
19 Appeals date is what?

20 MS. HUTCHINS: September the 25th.

21 MS. BLACK: We can move to push that out.

22 THE COURT: You will make those motions
23 or do we have to make it?

24 MS. HUTCHINS: It has to come from the
25 Court.

EXH C

02200

Writ Hearing
August 17, 2017

1 THE COURT: Does the Court have to make
2 it?

3 MS. HUTCHINS: It has to come from you.

4 THE COURT: You provide it to us. If you
5 send it to our court, we'll sign it and ask for more
6 time.

7 MS. HUTCHINS: That's fine.

8 THE COURT: Y'all did a fine job, both of
9 you. I'm really surprised of how verbal and good
10 you-all are.

11 MS. HUTCHINS: What type of timetable
12 would you like for the defense to make their motion and
13 objections?

14 THE COURT: What do you think is a
15 reasonable amount of time?

16 MS. ECKHOFF: Your Honor, we would
17 request at least 30 days, if possible, only because we
18 actually have evidentiary --

19 THE COURT: She's going to be in labor.

20 MS. HUTCHINS: I don't know. I feel like
21 30 days is appropriate for findings. 10 days maybe for
22 an objection.

23 MS. BLACK: We both have evidentiary
24 hearings next week in other parts of the state that will
25 require being out of the office, but the two of us won't

EXH C

. 02201

Writ Hearing
August 17, 2017

1 be back in the office for many days for the next two
2 weeks. So it might be -- the request is just to put us
3 outside that window so we have some time to put our
4 heads together.

5 THE COURT: How many cases do y'all have,
6 that you two are handling?

7 MS. BLACK: Our office has 40 cases.

8 MS. ECKHOFF: Our office as a whole has
9 about 40 cases. I believe I currently have -- I'm
10 assigned on nine.

11 THE COURT: Okay.

12 MS. BLACK: I'm new to the office, so my
13 caseload hasn't ratcheted up. The reason for the
14 request is just that there are some cases that are
15 outside of where we live so we go on the road and it
16 just is hard to put a motion together when we're --

17 THE COURT: Okay. Y'all did a fine job.
18 Anything else before we're adjourned?

19 MS. HUTCHINS: Just your timetable,
20 Judge.

21 THE COURT: Oh. For you to respond in
22 writing to me, asking for an evidentiary hearing, how
23 about in 25 days or so?

24 Is that okay with you?

25 MS. HUTCHINS: Yes, Judge. I'm good with

EXH C

. 02202

1 whatever the Court decides.

2 THE COURT: What day is that? 9/12. And
3 forgive me. Tell me the name of the organization with
4 the State?

5 MS. ECKHOFF: We're with the Office of
6 Capital and Forensic Writs.

7 Is there also a timetable for the State's
8 response to our filing?

9 MS. HUTCHINS: I'm okay with ten days,
10 Judge.

11 THE COURT: Okay. Ten days beyond that.

12 MS. HUTCHINS: From 9/12, which would get
13 us to Friday, 9/22.

14 THE COURT: Okay. 9/22, and that's the
15 State's response to -- what's the acronym to your
16 office?

17 MS. HUTCHINS: The OCFW.

18 THE COURT: OCFW. Okay. Thank you very
19 much for your time.

20 MS. BLACK: Thank you, Your Honor.

21 MS. ECKHOFF: Thank you.

22 *(Hearing adjourned.)*

23

24

25

Writ of Habeas Corpus
August 17, 2017

1 STATE OF TEXAS
2 COUNTY OF HARRIS

3 I, Renee Reagan, Official Court Reporter in and
4 for the 179th District Court of Harris County, State
5 of Texas, do hereby certify that the above and
6 foregoing contains a true and correct transcription
7 of all portions of evidence and other proceedings
8 requested in writing by counsel for the parties to be
9 included in this volume of the Reporter's Record in
10 the above-styled and numbered cause, all of which
11 occurred in open court or in chambers and were
12 reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, offered by the respective parties.

16 WITNESS MY OFFICIAL HAND, this the 22nd day
17 of August, 2017.

18
19 /s/Renee Reagan
20 Renee Reagan, CSR
21 Texas CSR 7573
22 Official Court Reporter
23 179th District Court
24 Harris County, Texas
25 1201 Franklin
Houston, Texas 77002
Telephone: 832.927.4105
Expiration: 12/31/18

EXH C

. 02204

<p>MR. REISS: [2] 3/18 17/25 MS. BLACK: [27] 3/12 35/4 72/17 73/12 74/13 74/18 77/1 78/23 79/8 79/22 80/3 81/4 82/18 83/2 83/13 83/19 84/11 85/4 85/18 86/1 86/7 86/14 86/20 87/22 88/6 88/11 89/19 MS. ECKHOFF: [108] MS. HUTCHINS: [87] 3/16 9/25 10/11 10/15 11/11 11/17 11/20 13/19 18/19 22/6 22/19 23/24 24/5 24/11 24/16 24/23 25/2 25/6 25/24 28/3 29/3 32/17 34/23 35/6 35/10 35/18 35/23 36/4 36/9 36/11 36/25 37/4 37/18 37/21 38/6 38/9 39/21 39/23 39/25 40/16 42/23 43/6 43/10 43/24 44/13 44/20 45/14 50/8 53/13 53/17 53/22 53/24 54/21 55/18 56/2 56/6 56/13 56/21 58/15 59/13 59/15 63/13 63/22 66/9 66/17 69/8 69/12 70/12 70/22 75/19 75/23 83/24 84/7 85/10 85/23 86/16 86/19 86/23 87/2 87/6 87/10 87/19 88/18 88/24 89/8 89/11 89/16 THE COURT: [197] THE REPORTER: [2] 24/14 24/22</p>	<p>6 606 [6] 25/8 26/4 26/6 26/8 26/10 29/5 69 [1] 82/3</p> <p>7 70 [1] 67/7 71 [1] 67/7 713.274.5800 [1] 2/7 72 [1] 67/7 75 [1] 67/4 7573 [2] 1/22 90/19 77002 [3] 1/23 2/6 90/22 78701 [1] 2/17 79 [1] 82/2</p> <p>8 8-8 [1] 36/23 832.927.4105 [1] 90/22 88 [5] 36/17 36/23 36/23 37/4 49/23</p> <p>9 9/12 [2] 89/2 89/12 9/22 [2] 89/13 89/14</p> <p>A ABA [2] 63/7 63/13 abandoning [1] 25/21 ability [3] 9/17 34/17 52/6 able [9] 15/12 18/16 18/18 29/22 37/24 50/16 54/11 55/1 55/4 about [46] 7/25 16/9 16/9 17/5 17/6 18/9 22/1 25/17 27/4 28/8 28/10 28/14 28/19 30/17 30/18 39/4 41/11 42/14 44/23 45/2 45/3 45/5 45/6 49/13 52/2 54/4 55/18 55/20 56/23 58/17 62/19 66/13 66/20 66/24 67/16 69/2 72/23 74/12 77/18 77/23 79/19 80/14 81/6 85/20 88/9 88/23 above [3] 1/14 90/5 90/10 above-styled [1] 90/10 above-titled [1] 1/14 absolutely [1] 64/15 abundance [1] 60/14 abuse [7] 37/10 49/4 49/6 49/13 51/17 62/17 63/18 acceptable [1] 8/8 access [6] 13/4 14/1 17/7 17/11 17/21 78/8 accommodate [1] 24/3 accompany [1] 81/14 accomplished [1] 73/17 according [1] 50/17 account [4] 7/20 12/5 14/14 62/11 accounts [1] 9/14 accreditation [1] 82/11 accreditations [1] 82/16 accuracy [1] 42/15 accurate [1] 7/1 acknowledge [1] 47/3 acknowledging [1] 76/16 acronym [1] 89/15 actions [1] 25/12 acts [2] 37/1 37/3 actual [1] 44/7 actually [42] 4/14 7/21 8/2 9/4 9/20 11/8 12/14 12/19 15/14 15/16 16/20 18/12 19/18 20/7 22/11 23/25 26/3 32/11 32/14 33/15 38/4 40/8 44/9 44/16 50/13 52/24 54/5 54/23 55/7 58/3 60/12 62/16 66/5 69/13 69/15 70/19 71/6 71/19 72/24 76/5 85/22 87/18 ad [1] 74/16 add [2] 5/24 6/20 addition [2] 35/15 64/16 additional [11] 7/4 7/5 21/3 46/3 48/15 48/19 67/19 67/19 68/2 72/10 73/22 additionally [1] 46/18 address [14] 4/14 12/1 12/5 25/10 25/18 34/21 34/22 46/4 52/24 53/11 60/14 64/14 79/16 79/21 addressed [2] 64/12 64/13 addresses [4] 55/24 56/25 63/24 63/24 addressing [1] 18/7 adequate [1] 78/19 adequately [1] 62/11 adjourn [1] 83/24</p>	<p>adjourned [2] 88/18 89/22 admissible [5] 25/9 26/13 40/24 47/14 47/14 admit [2] 12/1 57/18 admonished [1] 27/14 admonitions [2] 26/24 27/1 advance [1] 23/23 adverse [2] 6/5 6/20 advice [2] 71/25 81/6 advisement [1] 75/4 affect [3] 21/7 21/16 23/5 affected [9] 21/1 21/21 22/14 22/16 22/17 22/23 28/15 55/21 56/9 affidavit [31] 8/13 10/22 11/1 11/7 11/8 11/16 12/2 12/3 14/6 23/12 40/2 41/15 42/18 46/22 47/3 47/8 47/15 54/3 55/6 55/24 56/11 63/23 64/4 71/4 71/5 71/6 71/22 78/4 78/7 78/15 78/21 affidavits [57] 5/5 5/23 6/1 7/1 13/23 13/23 14/9 17/16 17/23 19/17 19/20 21/3 25/9 25/14 29/17 29/23 32/1 32/7 33/9 34/2 34/4 39/14 39/19 40/22 46/7 46/9 46/24 50/18 52/24 56/10 60/9 60/14 64/10 70/14 71/2 73/17 73/18 73/23 74/6 74/10 74/17 74/25 75/2 75/7 76/12 76/21 77/5 77/19 77/21 77/24 78/21 79/4 79/8 81/15 84/3 84/9 86/4 affirmatively [1] 85/22 African [1] 68/12 African-Americans [1] 68/12 after [16] 4/14 7/16 7/22 9/23 19/23 21/8 23/4 23/5 30/16 31/3 32/8 41/21 53/16 58/16 58/17 67/4 aftermath [1] 30/20 afternoon [2] 3/21 3/23 again [19] 4/15 10/15 18/15 20/1 21/6 21/19 44/5 47/5 48/14 49/21 57/10 61/22 65/11 70/8 74/12 79/24 81/7 85/6 86/13 against [9] 9/18 30/14 35/12 36/1 36/25 37/3 41/11 65/25 67/18 aggravated [3] 7/19 35/17 67/19 ago [1] 78/17 agree [7] 27/25 31/8 63/22 64/22 65/2 70/10 71/12 agreed [4] 31/4 71/15 71/20 72/2 agreeing [1] 52/13 agreement [4] 68/11 71/19 71/20 71/21 ahead [4] 4/8 8/23 28/3 69/4 aid [1] 67/1 alibi [6] 29/24 38/3 39/4 39/5 39/10 40/5 all [48] 3/24 7/7 10/8 19/2 19/3 20/16 24/15 26/20 27/21 29/12 36/15 36/16 38/11 39/14 45/17 45/24 46/16 47/17 47/23 50/19 51/7 52/19 55/1 55/2 59/18 59/24 61/5 62/3 64/16 67/18 67/21 70/8 71/17 72/3 72/5 76/22 77/1 80/5 80/8 80/9 80/18 80/25 81/14 82/18 82/21 87/10 90/7 90/10 allegation [2] 33/12 59/11 allegations [7] 4/20 4/21 49/13 74/9 74/24 77/24 82/25 alleged [5] 22/14 51/18 55/22 56/5 73/6 alleging [3] 7/10 8/9 47/18 Allen [1] 19/24 allow [3] 58/10 78/18 79/1 allowed [4] 16/20 18/23 31/19 42/15 almost [2] 19/24 81/8 alone [3] 5/23 32/7 77/14 along [4] 3/18 11/13 27/19 28/11 alongside [1] 81/23 already [11] 15/2 21/8 21/18 22/21 23/7 23/10 40/22 59/10 74/13 79/19 81/19 also [40] 3/13 3/14 4/25 5/4 8/5 8/12 14/6 14/9 14/17 14/21 15/9 15/25 17/4 17/13 24/24 25/7 25/16 29/10 31/20 34/5 36/12 37/22 39/2 41/3 44/25 48/20 54/8 54/24 55/19 60/1 61/6 61/22 64/4 64/17 64/19 65/14 67/12 78/3 81/11 89/7 alternate [1] 41/10 although [1] 20/6 Alvin [2] 5/12 14/10</p>
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EXH C

<p>A</p> <p>always [1] 13/6 am [1] 85/11 Amendment [4] 49/16 59/3 59/4 68/14 Americans [1] 68/12 amongst [2] 42/19 54/7 amount [1] 87/15 anecdotal [1] 47/16 announced [1] 20/21 another [6] 15/23 21/17 28/14 30/11 35/14 76/20 answer [12] 10/20 10/21 12/15 13/22 14/20 22/9 46/16 51/6 51/20 70/3 72/10 72/12 answered [1] 78/20 answers [4] 55/3 55/11 70/15 70/25 any [29] 5/16 12/18 14/14 15/11 21/24 22/2 28/5 28/8 28/15 28/16 28/18 29/2 33/3 33/11 34/9 38/20 39/12 45/14 50/20 51/23 51/24 51/25 51/25 52/7 61/3 61/19 72/11 86/13 90/15 anybody [3] 5/17 71/2 71/14 anyone [1] 58/7 anything [8] 27/4 27/5 39/13 52/22 70/12 83/23 85/7 88/18 anyway [1] 60/23 anywhere [2] 23/23 70/22 apologize [3] 10/6 33/21 45/12 apparently [1] 12/13 appeal [13] 22/10 22/12 22/21 31/4 31/7 32/14 43/16 44/15 44/16 60/3 60/4 61/4 61/7 Appeals [9] 7/9 22/15 22/19 23/1 23/7 45/3 45/4 60/6 86/19 APPEARANCES [1] 2/1 appears [2] 16/19 54/25 appellate [8] 22/9 33/6 42/19 43/8 43/13 60/19 76/11 83/22 applicable [2] 76/6 76/9 applicant [23] 11/6 22/11 22/12 23/8 25/19 28/5 35/13 36/14 37/22 38/13 41/25 51/14 51/22 52/19 56/8 59/21 59/21 60/4 60/12 60/16 70/19 76/1 76/16 applicant's [7] 14/24 15/13 28/19 52/17 53/8 66/14 67/6 applicants [1] 51/24 application [12] 4/1 4/19 22/8 28/20 49/11 61/3 70/10 72/9 76/2 76/5 76/9 76/17 applies [1] 59/4 apply [1] 21/25 appoint [1] 82/15 appointed [3] 58/12 81/24 82/15 appreciate [10] 5/20 6/19 8/24 17/12 33/1 45/13 48/12 57/16 65/13 81/5 approach [2] 63/9 64/11 appropriate [4] 76/8 76/19 78/13 87/21 appropriately [2] 64/2 64/9 arbitrarily [1] 70/2 are [84] 4/15 4/19 4/20 4/21 5/14 5/19 5/23 5/25 6/4 6/25 8/9 11/6 11/14 13/22 14/23 15/2 16/5 16/6 16/13 17/17 18/5 23/21 23/22 23/22 25/9 25/11 26/12 26/24 27/14 29/11 31/16 35/11 35/24 38/11 39/18 45/19 45/22 46/1 51/6 53/3 54/2 54/17 55/4 55/22 55/23 56/1 57/10 57/18 58/18 61/18 61/19 62/7 62/19 68/1 68/3 68/3 69/2 70/8 70/9 73/19 74/13 75/7 75/11 76/3 76/17 77/10 77/17 77/21 78/20 79/25 80/6 80/18 81/16 82/1 82/4 82/14 84/13 84/13 84/18 86/11 87/10 88/6 88/14 88/14 aren't [1] 6/9 argue [8] 4/23 23/8 28/4 67/15 67/20 72/24 75/16 80/9 argued [2] 22/12 60/4 argues [1] 71/1 arguing [3] 33/21 33/22 33/23 argument [18] 15/22 25/15 25/17 32/13 43/14 43/20 49/20 52/16 52/16 53/16 56/23 57/5 57/5 57/6 67/10 69/15 74/16 78/16 arguments [2] 68/5 84/17 arise [1] 6/21</p>	<p>around [1] 30/24 Article [1] 73/4 ascertained [1] 28/22 ask [9] 10/2 21/16 33/17 34/10 55/2 57/14 73/9 74/7 87/5 asked [4] 21/7 33/11 33/13 71/19 asking [10] 20/15 20/16 28/25 46/3 47/7 52/8 65/7 78/6 78/25 88/22 aspect [2] 20/1 20/5 aspects [2] 29/12 48/21 assault [2] 7/19 35/15 assaulted [1] 62/25 assaults [2] 36/2 67/19 assert [2] 58/2 61/22 assess [2] 67/12 73/20 assessing [1] 29/20 assigned [2] 70/2 88/10 assist [1] 37/5 assistance [19] 5/7 6/9 19/7 29/9 43/12 43/14 48/25 57/17 58/1 72/22 73/13 74/5 75/16 77/12 77/18 78/14 82/20 83/1 83/10 Assistant [1] 2/5 assisting [1] 73/4 assume [1] 35/20 attached [10] 10/21 14/23 15/13 37/23 37/25 38/14 54/2 55/7 67/7 70/14 attaching [1] 86/3 attempted [4] 38/4 51/12 51/12 75/6 attempting [1] 63/16 attention [1] 4/13 attorney [6] 8/18 12/22 16/24 17/2 73/3 82/20 Attorney's [3] 2/5 3/20 14/4 attorneys [16] 2/5 2/7 2/18 15/10 16/4 16/7 16/20 16/21 17/24 42/18 81/22 82/8 82/14 82/24 83/4 83/22 attorneys' [2] 50/3 52/24 attribute [2] 11/3 11/5 attributed [1] 45/25 audience [2] 36/22 55/17 August [2] 1/13 90/17 Austin [3] 2/17 23/18 84/13 availability [1] 16/3 available [9] 12/16 12/18 13/6 14/1 14/8 16/10 16/11 29/25 50/19 Ave [1] 2/16 avoid [1] 32/4 aware [5] 14/17 15/8 20/12 24/1 35/12 away [2] 24/3 43/20 awkward [1] 83/9</p> <p>B</p> <p>back [21] 7/25 10/6 10/10 18/5 18/6 19/25 20/25 28/16 33/20 39/16 48/11 49/20 52/22 54/14 54/24 61/1 73/2 74/19 76/6 81/7 88/1 bad [2] 37/1 37/3 bailiff [2] 20/24 22/24 BALDERAS [24] 1/6 3/11 3/15 4/16 4/18 6/22 7/22 7/23 8/3 8/4 9/8 29/23 30/14 30/19 30/23 31/2 32/12 37/4 49/14 68/19 71/16 71/16 73/9 77/16 Balderas' [13] 4/2 5/6 7/17 8/1 33/12 48/17 49/3 49/15 68/12 68/15 68/19 70/1 70/5 bar [2] 3/20 72/9 Bardales [2] 42/4 42/4 Barker [1] 59/7 barred [3] 23/9 53/4 72/8 base [1] 17/4 based [15] 10/14 10/19 24/24 26/6 32/6 39/13 47/8 67/21 70/2 70/16 70/24 71/3 71/13 77/14 84/1 basically [9] 15/2 27/20 40/1 52/1 74/1 74/15 75/25 76/15 76/24 basis [2] 26/15 59/10 Batson [1] 70/21 battle [1] 55/1 be [61] 1/14 7/3 10/18 11/18 13/1 15/22 16/17 16/18 16/19 18/18 18/22 18/22 24/19 25/15 25/15 26/17 27/21 27/21 27/23 28/2 28/21 29/18 31/22 34/5 35/2 40/11 40/23 42/15 46/10 47/13 47/14 48/3 48/9 52/12 55/13 55/15 58/3 62/3 62/14 68/2 70/6 71/15 73/16</p>	<p>4/2 74/6 75/1 75/13 75/21 77/8 78/1 80/4 80/19 84/18 85/3 85/20 86/4 86/11 87/19 88/1 88/2 90/8 became [1] 33/25 because [42] 6/8 12/11 12/17 21/5 22/14 23/3 23/6 23/14 23/22 25/18 27/14 29/1 29/2 30/1 36/22 38/22 40/9 40/11 40/18 48/24 49/12 50/1 55/9 59/9 60/22 61/7 62/13 63/24 64/6 64/18 70/6 70/19 70/25 72/6 74/23 77/14 78/6 81/11 83/7 83/16 86/18 87/17 become [1] 6/5 been [31] 9/20 12/10 12/25 13/2 16/11 16/16 17/24 18/14 18/16 20/12 21/1 23/10 29/3 30/24 33/4 35/3 37/24 40/6 40/7 52/9 58/20 58/21 59/12 65/23 65/24 66/1 66/3 66/16 74/10 74/21 84/12 before [20] 1/15 10/7 12/23 15/19 15/20 30/22 31/21 32/3 55/14 59/12 61/1 61/3 75/4 78/16 79/10 81/23 81/24 83/24 84/22 88/18 begun [1] 59/10 behalf [6] 4/2 7/16 46/9 46/16 46/16 49/19 behavior [1] 55/20 being [6] 13/21 27/12 28/22 36/17 45/23 87/25 beliefs [1] 52/3 believe [35] 6/25 8/20 14/23 17/19 20/15 24/10 24/12 28/10 36/16 37/9 37/19 42/13 46/11 50/5 51/6 54/3 58/13 58/14 58/16 58/20 58/22 60/17 62/8 62/22 62/24 63/3 66/13 66/15 66/16 67/22 67/25 71/7 71/23 84/4 88/9 believed [5] 14/18 32/5 32/7 42/20 55/15 beneficial [1] 14/18 Benitez [6] 41/6 41/9 41/15 41/17 41/22 46/20 Bennett [2] 11/1 14/7 best [12] 7/2 9/17 12/10 42/22 51/3 74/14 82/11 82/14 83/4 83/11 84/17 85/9 better [4] 6/4 71/11 82/13 82/17 between [4] 16/1 38/12 68/11 79/24 beyond [1] 89/11 bias [2] 28/9 52/20 big [1] 36/14 bill [1] 54/6 bind [1] 63/16 bit [6] 4/10 5/4 25/16 34/23 45/2 64/6 Black [3] 2/15 3/13 72/16 booked [2] 23/22 23/23 bored [1] 27/12 both [14] 6/12 14/10 17/10 28/12 44/6 44/6 64/14 78/11 84/23 85/1 85/1 85/16 87/8 87/23 boy [1] 49/7 Brady [5] 9/1 9/9 9/19 12/9 13/21 brain [1] 37/10 break [4] 20/22 20/22 29/4 62/4 briefly [3] 39/17 56/22 59/14 bring [3] 35/2 54/5 54/6 bringing [2] 58/11 78/9 brother [5] 37/15 38/24 39/6 40/11 40/16 brought [3] 4/13 9/1 65/25 burden [4] 4/18 4/19 28/20 77/15 bus [2] 19/10 26/19</p> <p>C</p> <p>caliber [1] 8/18 call [5] 31/21 34/17 40/10 42/5 56/18 called [6] 18/12 24/10 41/12 55/5 56/6 60/21 calling [2] 32/2 55/10 came [12] 1/14 20/20 28/16 38/19 43/7 49/20 52/1 56/17 72/19 72/23 73/9 74/1 can [27] 10/6 10/13 10/18 12/5 15/8 16/11 18/1 18/21 21/13 25/25 28/13 29/12 35/2 48/9 58/8 58/18 64/9 66/16 72/12 73/20 74/11 78/10 79/3 83/5 83/11 85/1 86/21 can't [5] 15/7 28/21 45/15 54/16 75/12 capital [22] 2/16 3/10 3/14 5/15</p>
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<p>C</p> <p>capital... [18] 6/16 7/19 14/3 18/12 18/14 35/14 35/14 35/25 41/8 63/8 82/4 82/8 82/8 82/12 82/15 83/5 83/9 89/6</p> <p>capriciously [1] 70/2</p> <p>Card [1] 3/20</p> <p>care [4] 45/2 45/5 45/6 80/22</p> <p>cared [1] 45/3</p> <p>carefully [1] 74/20</p> <p>case [58] 5/3 10/7 10/19 11/13 13/24 15/17 15/21 15/22 16/2 16/2 16/7 16/16 16/19 17/2 21/5 21/25 25/8 25/11 25/13 25/19 26/25 28/7 28/13 28/20 29/16 29/18 30/14 31/6 32/15 35/13 36/8 37/12 39/7 43/6 47/6 47/10 48/18 50/10 53/20 58/3 58/22 59/8 59/18 59/24 59/25 60/2 62/12 62/17 63/15 63/18 63/25 66/5 70/9 72/7 72/22 77/8 83/5 83/9</p> <p>caseload [1] 88/13</p> <p>cases [13] 5/15 6/13 6/21 16/5 16/5 44/7 63/8 71/8 82/8 88/5 88/7 88/9 88/14</p> <p>caseworker [1] 51/15</p> <p>cause [4] 1/2 1/15 3/7 90/10</p> <p>CCA [6] 31/4 31/9 43/17 44/20 61/4 76/24</p> <p>CCA's [1] 43/17</p> <p>Celeste [3] 42/5 44/10 44/12</p> <p>cell [3] 66/14 66/20 67/17</p> <p>certain [1] 81/13</p> <p>certainly [3] 5/24 52/11 83/20</p> <p>certificates [1] 84/4</p> <p>certify [2] 90/5 90/13</p> <p>Chabot [1] 9/3</p> <p>chain [1] 61/13</p> <p>chair [2] 27/19 72/17</p> <p>chairs [1] 35/3</p> <p>challenge [5] 5/1 6/22 31/11 69/25 70/21</p> <p>chambers [1] 90/11</p> <p>chance [1] 40/7</p> <p>change [2] 10/24 55/11</p> <p>changed [2] 28/22 56/18</p> <p>changeover [1] 60/1</p> <p>character [2] 30/2 51/11</p> <p>characterization [1] 42/12</p> <p>characterize [2] 35/25 42/1</p> <p>charge [4] 7/19 19/25 36/7 64/20</p> <p>charged [6] 35/13 35/14 35/22 36/1 41/9 75/8</p> <p>charges [5] 65/24 65/25 66/4 66/6 66/8</p> <p>Chavez [1] 9/3</p> <p>check [1] 66/16</p> <p>child [2] 37/10 49/4</p> <p>childhood [2] 51/5 51/17</p> <p>children [1] 62/17</p> <p>circumstances [4] 12/6 19/15 21/23 63/20</p> <p>cite [2] 45/7 58/8</p> <p>cited [1] 45/25</p> <p>claim [47] 8/25 9/3 9/9 9/9 9/19 12/8 12/9 17/18 19/8 19/8 22/5 30/11 32/22 32/22 33/5 33/7 43/12 46/19 48/13 48/23 48/25 49/15 58/1 58/1 59/2 59/3 59/11 62/9 62/10 63/6 63/12 65/18 65/19 65/20 66/7 68/10 68/15 68/19 68/23 70/1 70/5 75/11 75/12 75/16 78/4 78/5 78/9</p> <p>claiming [1] 6/9</p> <p>claims [46] 4/3 4/4 4/15 4/23 5/6 5/7 6/4 6/7 7/11 7/14 17/14 19/7 29/8 30/9 34/20 46/1 50/14 53/3 57/18 61/2 61/5 61/19 62/16 68/1 68/2 68/3 68/8 70/9 72/11 73/10 73/14 73/14 74/1 74/4 76/2 76/3 76/4 76/5 77/10 77/13 78/14 80/5 80/5 83/6 83/7 83/10</p> <p>clarification [1] 65/2</p> <p>clarified [1] 44/11</p> <p>clarify [4] 44/15 45/9 84/2 85/19</p> <p>clause [1] 68/13</p> <p>clauses [1] 68/17</p> <p>CLE [2] 82/7 82/7</p> <p>clear [8] 19/20 20/7 24/16 27/20 29/17 33/25 45/12 63/9</p> <p>cleared [3] 66/3 66/7 67/3</p> <p>clerk's [2] 84/1 84/5</p> <p>clerks [1] 85/4</p>	<p>client [3] 3/3 29/16 62/3</p> <p>clients [1] 6/6</p> <p>clock [1] 76/24</p> <p>closer [1] 73/10</p> <p>closing [4] 49/20 56/23 57/6 69/15</p> <p>Colorado [1] 64/5</p> <p>come [17] 19/25 19/25 31/12 32/2 41/2 43/5 46/7 49/23 50/1 52/6 54/8 54/9 73/7 80/1 83/22 86/24 87/3</p> <p>coming [11] 16/3 20/9 26/12 32/4 32/5 34/16 38/17 52/19 71/9 71/11 71/14</p> <p>comment [3] 28/8 28/10 51/18</p> <p>comments [7] 28/15 28/17 55/20 55/22 55/23 55/23 56/8</p> <p>common [1] 6/2</p> <p>compare [1] 67/6</p> <p>comparing [1] 9/17</p> <p>complainant [1] 41/11</p> <p>complainant's [1] 41/13</p> <p>computerized [1] 1/18</p> <p>concern [1] 72/19</p> <p>conduct [6] 28/22 31/24 32/5 33/3 48/14 64/17</p> <p>confessed [2] 7/23 8/4</p> <p>confused [1] 25/16</p> <p>Congress [1] 2/16</p> <p>conjunction [1] 64/11</p> <p>consciousness [1] 15/3</p> <p>consider [6] 59/6 62/16 63/18 64/9 64/20 65/4</p> <p>considered [2] 58/3 64/2</p> <p>considering [3] 31/4 56/15 59/5</p> <p>consistent [2] 14/22 71/4</p> <p>constitute [1] 13/3</p> <p>constituted [1] 12/24</p> <p>constitutes [1] 64/23</p> <p>constitution [1] 68/18</p> <p>constitutional [2] 59/2 68/20</p> <p>contact [3] 38/15 38/21 39/8</p> <p>contained [1] 40/3</p> <p>contains [1] 90/6</p> <p>contemplated [1] 77/5</p> <p>contemplates [1] 73/4</p> <p>contemporaneous [1] 40/3</p> <p>content [2] 14/2 28/7</p> <p>context [5] 52/15 67/17 78/1 78/13 81/7</p> <p>continuance [1] 60/17</p> <p>continue [14] 3/24 5/18 5/21 6/18 8/23 18/4 22/3 30/6 44/1 50/3 56/21 58/25 61/6 67/24</p> <p>continuing [1] 38/19</p> <p>contraband [6] 66/17 66/18 66/19 66/20 66/21 67/17</p> <p>contradicted [1] 80/16</p> <p>contradictory [1] 12/14</p> <p>contrary [1] 5/1</p> <p>control [1] 40/19</p> <p>controverted [3] 75/10 77/9 81/16</p> <p>conversation [2] 15/6 71/24</p> <p>conviction [13] 3/12 7/24 9/10 11/4 11/7 13/2 16/4 16/8 16/13 17/4 18/17 47/18 72/9</p> <p>convince [2] 77/6 81/15</p> <p>copies [1] 13/17</p> <p>copy [4] 14/5 46/12 75/21 75/21</p> <p>corpus [1] 4/2</p> <p>correct [13] 6/10 13/15 19/12 20/19 22/20 36/9 36/10 37/2 56/7 60/7 63/5 85/11 90/6</p> <p>corrected [1] 81/1</p> <p>corrections [2] 65/22 66/1</p> <p>correctly [2] 44/9 90/14</p> <p>could [29] 9/21 9/24 13/25 31/21 31/22 32/8 33/4 36/24 40/24 41/2 41/16 42/13 42/14 44/12 48/16 49/6 49/7 53/15 53/15 61/25 64/2 68/22 70/7 73/8 73/16 74/14 79/9 79/11 81/8</p> <p>couldn't [2] 40/19 54/7</p> <p>counsel [59] 5/5 5/7 6/5 6/9 9/18 12/11 12/17 12/25 13/1 13/6 13/25 14/5 16/14 18/15 19/7 29/9 29/17 29/25 30/1 32/1 32/11 32/14 33/2 33/6 34/2 36/19 37/6 38/13 40/21 41/6 41/17 42/19 43/13 43/14 44/23 45/23 46/8 48/14 48/25 49/1 55/13 57/17 58/1 62/11 63/15 65/5 71/17 72/22 73/14 74/5 75/16 76/12 77/12 77/18 78/14 82/21</p>	<p>3/10 83/11 90/8</p> <p>counsel's [4] 9/16 12/12 25/17 42/11</p> <p>counsels' [3] 18/16 29/15 50/18</p> <p>count [1] 37/24</p> <p>counties [1] 82/11</p> <p>county [15] 1/5 1/16 2/5 3/20 5/16 6/16 32/17 51/16 65/23 82/10 82/13 82/17 90/1 90/4 90/21</p> <p>couple [4] 20/20 46/5 53/11 84/12</p> <p>course [10] 7/25 12/15 13/7 26/15 29/21 46/21 49/2 49/7 62/24 82/7</p> <p>court [100]</p> <p>Court's [4] 42/12 44/3 78/8 81/5</p> <p>courthouse [1] 82/6</p> <p>courtroom [2] 22/25 40/18</p> <p>Courts [1] 83/7</p> <p>cover [1] 43/23</p> <p>credibility [4] 41/23 52/21 73/20 78/10</p> <p>credible [4] 10/22 13/23 39/12 40/11</p> <p>crime [3] 31/3 82/12 82/15</p> <p>crimes [1] 36/16</p> <p>criminal [8] 22/15 22/18 23/1 23/7 40/12 45/3 60/6 86/18</p> <p>Crips [1] 36/13</p> <p>criticize [1] 56/23</p> <p>cross [12] 6/3 9/22 14/19 49/8 50/23 51/20 52/5 52/15 54/11 54/12 66/21 78/12</p> <p>cross-examination [5] 14/19 49/8 52/15 54/12 66/21</p> <p>cross-examine [3] 6/3 9/22 78/12</p> <p>cross-examined [2] 50/23 51/20</p> <p>cross-examining [1] 52/5</p> <p>cruel [1] 68/16</p> <p>CSR [3] 1/22 90/19 90/19</p> <p>currently [1] 88/9</p> <p>curatory [1] 6/25</p> <p>curtain [2] 29/5 29/5</p> <p>custody [1] 67/20</p> <p>cut [1] 55/7</p>
---	---	---

deliberated [1] 20/20 deliberation [2] 19/24 56/9 deliberations [5] 25/10 27/5 28/8 55/22 64/21 delve [1] 57/11 demeanor [2] 73/21 78/11 denial [1] 59/10 denied [3] 4/21 43/18 59/9 denying [1] 60/8 department [1] 16/14 depth [1] 72/23 described [2] 20/24 49/10 description [2] 19/13 19/14 deserve [1] 74/25 designating [4] 33/24 75/9 75/24 77/3 desire [1] 60/12 despite [2] 26/24 72/9 detail [2] 71/7 74/4 details [1] 27/8 determination [1] 23/7 determine [1] 70/8 determined [1] 76/4 develop [1] 48/15 developed [1] 62/14 development [13] 28/25 29/3 37/10 48/1 61/23 72/21 73/1 73/11 73/15 75/9 77/4 77/19 78/6 Diaz [17] 4/6 7/15 7/25 9/7 9/12 9/22 10/24 10/25 11/6 11/9 11/16 12/4 12/10 41/12 41/14 42/4 78/5 Diaz's [6] 11/2 11/4 14/2 14/22 15/11 41/11 dictate [1] 63/7 did [62] 8/2 8/5 8/9 9/6 9/16 10/23 13/3 15/18 15/23 20/4 20/14 20/19 21/2 21/7 21/16 21/21 22/1 22/25 23/2 23/3 23/5 24/2 27/4 27/11 27/17 30/22 31/9 31/10 33/15 38/6 38/15 38/16 38/23 39/11 40/4 40/8 40/11 41/1 41/22 42/7 43/5 44/24 45/15 46/5 48/14 48/20 48/20 50/1 50/11 51/2 57/6 59/6 62/11 62/13 64/6 69/13 69/19 74/14 78/22 80/1 87/8 88/17 didn't [23] 8/7 17/13 25/21 28/16 31/1 31/2 34/7 34/9 34/18 36/6 45/2 45/11 45/12 51/23 51/25 53/2 56/24 62/15 63/12 71/22 76/25 80/14 84/6 difference [2] 16/1 79/24 different [15] 10/7 12/23 16/6 16/18 16/19 36/16 36/17 36/24 37/7 37/23 37/25 38/12 50/15 73/4 85/21 differing [2] 9/14 13/7 difficult [1] 6/2 difficulty [1] 27/11 dire [3] 59/9 63/16 64/11 direct [14] 22/10 22/12 22/21 31/4 31/7 32/14 43/16 44/15 44/15 54/11 60/3 60/4 61/4 61/7 dired [1] 63/25 disagree [3] 21/11 42/11 61/12 disagreed [1] 31/6 disassociation [1] 51/13 disclosed [3] 13/22 16/16 16/17 disclosure [2] 12/20 13/2 discoverable [1] 52/12 discovered [1] 26/22 discovery [3] 16/12 16/13 40/14 discrete [1] 80/6 discuss [6] 19/6 26/25 27/11 27/14 28/7 47/25 discussed [5] 4/10 5/4 6/24 71/16 86/3 discusses [1] 44/6 discussing [2] 12/8 46/15 disingenuous [1] 45/7 dismiss [1] 71/13 dismissed [3] 71/15 71/15 71/18 dispositive [1] 11/14 dispute [2] 38/2 77/25 disputed [2] 75/12 75/14 disputes [3] 45/19 57/10 61/24 dissent [1] 44/24 dissenting [2] 44/19 45/5 district [11] 1/4 1/6 1/22 2/5 2/5 3/20 14/4 58/14 73/3 90/4 90/20 division [1] 15/3 do [45] 6/25 7/8 9/7 10/3 10/3	10/4 10/10 13/12 15/12 17/1 17/1 17/5 19/5 25/13 34/6 34/9 34/10 34/15 34/15 39/6 46/6 47/17 50/25 54/11 56/21 58/6 58/7 58/7 58/13 63/12 74/17 75/6 75/18 76/21 76/25 79/3 79/23 80/6 82/13 82/16 86/14 86/23 87/14 88/5 90/5 document [7] 11/11 11/12 14/4 18/15 18/19 66/25 86/10 documentation [1] 52/7 documented [1] 38/12 documents [3] 9/10 9/11 11/14 does [12] 15/9 34/14 39/7 75/22 75/23 75/25 77/1 77/2 80/7 82/13 82/17 87/1 doesn't [4] 9/4 30/8 78/17 78/19 doing [11] 6/1 10/5 27/23 31/14 44/9 69/14 74/7 74/15 75/9 82/23 82/23 don't [48] 5/8 5/16 7/8 21/24 25/20 26/16 27/15 29/1 32/19 32/20 34/11 34/14 34/20 35/20 35/21 41/16 42/9 43/19 45/5 47/1 49/9 52/8 53/7 53/9 55/17 56/12 58/7 58/13 58/14 61/11 64/24 66/15 72/11 72/14 75/20 78/6 79/5 80/22 81/20 82/12 82/18 84/10 85/2 85/7 85/7 86/9 86/14 87/20 done [4] 7/1 43/13 51/3 70/17 door [8] 31/24 32/6 32/9 32/9 42/7 42/17 42/20 44/13 double [1] 66/16 double-check [1] 66/16 doubt [1] 49/12 down [14] 35/3 35/4 35/10 45/4 65/3 71/8 71/11 71/14 80/12 80/24 81/6 84/16 85/9 86/3 dozens [2] 6/13 6/13 Dr [4] 31/12 31/21 44/12 44/13 Dr. [3] 32/2 44/4 44/8 Dr. Malpass [3] 32/2 44/4 44/8 drop [3] 61/9 61/12 61/19 due [9] 5/2 22/13 22/22 40/12 68/16 74/25 75/16 80/7 82/21 during [19] 14/12 14/14 15/11 16/2 16/6 16/11 16/16 22/7 40/14 40/18 41/18 43/8 49/19 51/8 53/22 53/23 59/16 59/25 63/16 dynamic [1] 6/20	3/6 83/7 83/18 errors [7] 7/10 47/18 79/18 79/20 79/22 80/13 83/16 Escobar [1] 38/18 especially [2] 11/15 23/23 essentially [1] 65/23 establish [2] 43/19 56/8 established [1] 4/3 esteem [1] 8/19 evaluate [1] 78/10 eve [2] 7/17 60/13 even [25] 8/3 11/3 11/5 15/19 15/21 20/3 23/4 23/5 23/11 23/15 23/19 28/14 28/20 29/11 31/3 43/14 59/12 61/6 64/24 65/11 69/14 74/10 83/4 83/9 83/11 event [8] 15/4 15/4 15/4 19/21 21/21 21/21 29/24 77/17 events [1] 21/4 every [13] 8/13 52/2 56/16 71/18 79/17 80/10 80/20 80/21 81/4 81/8 83/18 83/21 83/22 everybody [1] 12/5 everything [3] 54/24 70/17 85/7 everywhere [2] 24/16 24/17 evidence [34] 4/10 4/22 4/25 5/1 9/20 12/20 25/8 26/11 28/17 29/19 32/8 35/12 41/7 41/7 47/15 49/3 50/11 50/12 50/13 50/21 51/2 51/4 51/7 51/14 51/16 57/7 60/15 63/18 64/21 64/22 67/18 70/7 76/14 90/7 evidentiary [12] 4/24 6/1 11/15 33/22 45/21 77/22 78/2 81/13 86/5 87/18 87/23 88/22 Ex [1] 9/3 exact [2] 27/8 50/13 exactly [4] 27/22 45/20 49/9 66/4 examination [8] 14/19 15/12 22/24 49/8 52/15 54/12 54/12 66/21 examine [6] 6/3 6/22 9/22 17/20 78/12 78/12 examined [3] 32/13 50/23 51/20 examining [2] 52/5 67/13 example [6] 15/23 38/14 42/3 46/11 46/19 78/3 except [1] 26/13 exchange [1] 7/18 exchanged [1] 56/1 exclude [1] 68/12 excluded [2] 70/15 70/16 Excuse [1] 4/7 excused [2] 71/3 71/3 exhibit [2] 15/13 55/7 exhibits [7] 10/21 14/23 37/23 38/14 54/3 67/7 90/15 exist [1] 75/15 exonerated [1] 65/24 expect [1] 85/8 expected [2] 10/25 55/13 expert [7] 27/12 30/12 31/12 51/20 51/21 54/19 54/23 expertise [1] 31/16 experts [20] 28/10 28/12 28/12 37/8 37/9 38/13 49/3 49/4 49/8 49/14 49/18 50/24 50/24 50/25 51/2 52/1 52/6 52/8 52/13 52/18 experts' [1] 49/12 Expiration [1] 90/23 explain [4] 31/22 49/5 71/24 85/25 explained [3] 31/16 51/19 71/17 explaining [1] 19/17 explains [1] 71/22 exploration [1] 78/18 explore [4] 45/22 62/13 62/15 65/5 exposed [1] 4/11 expressed [1] 60/12 extensive [3] 35/12 37/11 50/12 extent [3] 6/23 7/5 9/5 extra [1] 33/3 extraneous [11] 4/12 19/8 26/14 26/17 31/24 32/4 32/5 35/18 36/24 42/8 42/21 extraneous [8] 35/19 42/9 42/17 49/23 49/25 50/21 50/22 59/19 eye [1] 71/8 eyewitness [5] 30/12 30/15 31/11 31/13 37/11
	E	e-mail [3] 15/14 84/25 85/4 e-mails [7] 37/23 37/24 38/12 39/2 39/15 40/4 54/2 each [3] 9/24 10/23 52/2 earlier [1] 73/3 early [2] 13/24 39/3 Eckhoff [2] 2/14 3/10 effect [8] 19/19 20/2 22/25 27/1 29/2 33/6 52/8 76/23 effective [1] 15/12 effects [3] 48/22 49/5 49/6 effort [1] 31/13 eight [1] 30/16 either [6] 18/18 41/4 41/17 64/25 78/20 84/11 Eleazar [1] 63/4 elicited [1] 66/22 eligible [1] 67/3 else [2] 83/23 88/18 encouraged [1] 27/18 end [9] 10/2 23/6 43/19 53/3 54/21 59/2 64/15 70/17 83/25 ended [2] 24/18 36/16 endless [1] 28/11 English [1] 54/18 enough [2] 21/14 81/3 enter [1] 34/1 entire [3] 28/24 33/8 63/9 entirely [3] 16/18 16/19 20/18 entirety [5] 52/14 57/5 57/5 66/11 67/5 entitle [3] 4/3 73/8 77/16 entitled [4] 4/16 31/7 65/5 75/1 entitles [1] 9/8 enumerate [1] 74/11 episode [1] 62/20 equal [2] 68/13 68/16 equals [2] 66/19 69/16 Erin [2] 2/14 3/9 err [1] 23/2 erred [1] 60/5 error [7] 18/7 19/1 58/12 60/6
	F	F-A-R-N-A-Z [1] 3/18 Facebook [7] 25/22 25/24 26/21

<p>F</p> <p>Facebook... [4] 26/23 27/2 28/6 28/19</p> <p>fact [26] 5/23 9/6 20/5 23/3 28/25 29/2 30/17 32/9 33/7 37/7 45/20 47/6 52/17 54/4 55/25 59/19 68/2 70/10 73/16 74/5 74/21 75/8 75/10 77/9 81/17 82/21</p> <p>factors [3] 58/19 59/7 59/24</p> <p>facts [9] 5/24 28/7 39/12 48/15 48/16 73/6 73/25 75/13 77/15</p> <p>factual [18] 45/19 47/25 57/10 61/23 61/24 72/21 73/1 73/5 73/11 73/15 74/9 75/9 75/13 77/4 77/10 77/19 78/6 78/20</p> <p>failing [2] 33/2 58/2</p> <p>fails [2] 28/5 56/8</p> <p>failure [6] 30/6 30/9 49/1 51/19 52/17 67/1</p> <p>fair [4] 6/21 18/20 21/14 53/1</p> <p>fairly [1] 82/22</p> <p>fall [1] 12/18</p> <p>false [13] 4/5 9/2 9/5 9/7 10/16 65/20 66/8 66/11 67/10 67/14 67/14 77/12 78/5</p> <p>familiar [1] 64/7</p> <p>family [13] 19/23 35/21 37/14 38/16 38/16 38/18 38/20 39/3 40/2 40/4 51/5 51/15 54/1</p> <p>far [2] 24/3 33/11</p> <p>Farnaz [4] 2/2 3/17 17/6 47/23</p> <p>fashioned [1] 48/24</p> <p>favorable [1] 71/14</p> <p>federal [2] 61/15 79/18</p> <p>feel [6] 27/15 40/11 73/6 74/25 78/12 87/20</p> <p>feeling [2] 27/11 51/3</p> <p>felt [2] 19/22 57/3</p> <p>Fifth [1] 49/16</p> <p>file [17] 9/17 12/12 12/17 13/25 14/8 14/13 14/24 16/1 16/4 29/15 29/19 66/5 74/20 75/21 79/11 81/12 84/1</p> <p>filed [16] 4/1 22/9 22/9 43/12 60/13 60/18 60/22 61/3 74/21 74/23 76/1 76/16 78/15 78/17 81/10 84/3</p> <p>files [2] 14/16 18/16</p> <p>filing [1] 89/8</p> <p>final [1] 62/9</p> <p>finally [1] 39/4</p> <p>find [4] 9/16 18/16 18/22 65/7</p> <p>finding [5] 5/24 45/20 47/6 68/2 70/10</p> <p>findings [2] 73/5 87/21</p> <p>finds [1] 76/1</p> <p>fine [9] 18/22 35/2 53/17 78/22 79/13 79/14 87/7 87/8 88/17</p> <p>first [16] 7/7 8/25 10/10 11/19 11/20 11/21 13/20 23/14 24/5 26/1 65/10 70/3 79/7 81/12 82/2 82/10</p> <p>five [7] 21/3 29/8 36/5 36/6 62/24 78/15 80/25</p> <p>flashed [1] 41/18</p> <p>focuses [1] 64/8</p> <p>follow [2] 34/9 69/23</p> <p>follow-up [1] 34/9</p> <p>following [2] 1/13 30/3</p> <p>foot [1] 54/6</p> <p>foregoing [1] 90/6</p> <p>Forensic [4] 2/16 3/10 3/14 89/6</p> <p>forgive [3] 23/20 27/7 89/3</p> <p>form [5] 5/23 74/15 74/24 75/3 85/3</p> <p>former [1] 6/5</p> <p>forth [1] 81/8</p> <p>forward [2] 58/23 68/4</p> <p>found [12] 9/11 17/15 24/3 40/14 40/23 43/17 44/17 44/21 55/9 66/13 67/17 75/14</p> <p>four [6] 35/24 36/3 36/4 50/24 58/18 80/25</p> <p>Fourteenth [2] 59/4 68/13</p> <p>frame [1] 86/15</p> <p>Franklin [3] 1/23 2/6 90/21</p> <p>free [1] 27/15</p> <p>fresh [2] 57/19 77/7</p> <p>Friday [1] 89/13</p> <p>friends [2] 27/18 51/15</p> <p>front [2] 33/19 42/10</p> <p>fry [1] 27/19</p> <p>full [2] 19/24 78/18</p> <p>funny [1] 48/24</p>	<p>further [22] 17/20 28/25 30/3 30/6 30/9 45/14 45/22 47/6 47/25 61/13 61/23 70/10 71/23 72/21 72/25 73/11 73/15 74/4 78/6 81/15 84/16 90/13</p> <p>future [1] 61/20</p> <p>G</p> <p>gang [6] 36/13 40/13 41/18 41/18 46/20 51/13</p> <p>gangs [1] 37/9</p> <p>gauge [1] 65/6</p> <p>gave [6] 7/20 9/13 9/13 36/18 39/4 64/18</p> <p>general [2] 16/14 64/3</p> <p>generally [1] 16/15</p> <p>germane [2] 56/20 57/14</p> <p>get [14] 12/4 31/13 39/2 47/8 55/3 55/14 58/21 60/10 61/16 79/3 83/8 84/24 85/17 89/12</p> <p>getting [3] 55/12 55/13 59/12</p> <p>giant [1] 15/7</p> <p>Giglio [1] 9/1</p> <p>girlfriend [6] 37/15 37/17 38/18 38/25 40/8 55/9</p> <p>give [15] 9/24 27/19 38/20 42/14 42/18 48/8 52/6 56/19 64/2 64/8 65/17 72/10 78/19 84/22 84/22</p> <p>given [8] 6/20 8/12 14/5 39/8 40/7 69/24 73/7 81/19</p> <p>gives [1] 9/24</p> <p>giving [7] 10/8 30/21 32/25 57/16 65/9 65/11 65/12</p> <p>globally [1] 64/1</p> <p>go [33] 3/6 4/8 7/6 7/9 7/12 7/25 8/23 10/6 18/1 19/3 19/5 26/1 27/16 28/3 29/6 29/12 33/20 47/17 51/7 54/14 56/12 57/12 57/14 57/16 69/4 72/10 73/2 74/4 80/21 81/3 83/14 86/12 88/15</p> <p>God [2] 39/21 39/23</p> <p>God-nich [1] 39/21</p> <p>Godinich [19] 5/11 14/10 14/11 15/14 17/6 33/9 34/3 39/15 39/18 39/22 39/24 41/14 45/25 46/12 47/10 60/10 76/20 81/24 84/3</p> <p>Godinich's [3] 54/2 55/6 64/4</p> <p>goes [3] 43/20 64/16 71/7</p> <p>going [31] 10/2 11/3 11/5 21/9 26/11 26/11 34/1 34/6 34/15 36/13 37/12 48/11 50/21 54/6 55/15 57/12 58/23 59/25 61/1 61/18 65/16 68/4 76/18 79/5 79/16 84/18 84/25 86/11 86/12 86/13 87/19</p> <p>gold [1] 15/7</p> <p>gone [3] 11/22 72/23 81/7</p> <p>good [8] 3/21 3/22 3/22 23/21 77/21 81/25 87/9 88/25</p> <p>got [2] 30/3 46/2</p> <p>gotcha [1] 61/17</p> <p>Graham [2] 13/23 59/17</p> <p>grant [2] 84/15 85/8</p> <p>greater [1] 67/17</p> <p>greatly [1] 17/23</p> <p>ground [2] 43/4 72/2</p> <p>grounds [3] 10/14 72/3 76/17</p> <p>growing [2] 48/21 49/5</p> <p>guaranteeing [1] 85/6</p> <p>guard [1] 51/16</p> <p>guess [8] 11/3 22/8 28/2 43/2 55/23 70/18 79/10 81/8</p> <p>guidelines [3] 16/15 63/7 63/13</p> <p>guilt [10] 27/5 29/10 29/15 30/9 32/21 34/20 41/8 41/19 42/6 83/15</p> <p>guilt/innocence [2] 41/19 42/6</p> <p>guilty [1] 20/1</p> <p>Guiney [4] 20/23 33/19 34/1 75/23</p> <p>H</p> <p>habeas [5] 4/1 4/3 4/16 11/7 76/14</p> <p>had [57] 5/11 5/17 6/12 6/24 7/22 8/8 9/19 10/6 12/10 12/20 12/25 13/2 13/6 15/16 16/25 17/7 17/10 18/13 18/17 19/19 20/2 20/12 20/12 20/15 29/2 29/2 30/22 30/23 30/24 31/14 34/2 34/5 34/23 37/9 38/10 38/22 39/1 46/14 48/22 52/2 52/11 52/19 58/8 59/10 60/11 62/9 65/23 65/24 66/1 66/3 71/16 72/20 73/15 73/16 74/3 77/6 80/17</p> <p>hadn't [1] 74/10</p> <p>hand [2] 72/15 90/16</p>	<p>handle [3] 16/5 16/7 16/12</p> <p>handled [1] 13/24</p> <p>handling [3] 17/2 60/2 88/6</p> <p>hands [1] 23/17</p> <p>handwritten [2] 9/11 15/5</p> <p>happen [1] 80/17</p> <p>happened [8] 9/14 19/18 20/12 23/16 25/4 31/24 45/23 45/24</p> <p>happening [1] 36/23</p> <p>happens [2] 56/16 83/21</p> <p>happy [2] 7/6 65/14</p> <p>hard [1] 88/16</p> <p>harm [3] 28/5 43/19 64/18</p> <p>HARRIS [10] 1/5 1/16 2/5 3/20 51/16 65/22 82/13 90/1 90/4 90/21</p> <p>has [25] 4/18 4/20 8/4 8/12 12/13 14/25 16/16 17/6 20/23 22/20 23/1 23/7 31/4 37/22 38/14 55/25 58/21 74/21 75/12 76/4 81/7 86/24 87/3 88/7 88/8</p> <p>hasn't [1] 88/13</p> <p>have [129]</p> <p>haven't [4] 16/8 18/17 29/2 86/13</p> <p>having [8] 19/23 24/18 40/6 52/4 52/7 52/22 78/15 83/6</p> <p>he [94]</p> <p>he's [9] 12/7 15/19 28/14 32/19 35/22 46/15 62/20 70/25 81/25</p> <p>head [2] 64/7 66/19</p> <p>heads [2] 52/2 88/4</p> <p>health [1] 37/9</p> <p>hear [3] 12/5 69/17 74/5</p> <p>heard [5] 8/15 56/4 56/9 56/17 81/20</p> <p>hearing [35] 1/10 4/24 6/1 11/15 15/15 15/17 20/15 20/15 20/23 31/15 33/23 34/17 44/10 45/21 48/4 49/13 49/17 57/11 59/18 74/1 74/21 77/22 78/2 80/3 80/7 80/7 80/9 81/7 81/12 81/13 84/16 85/8 86/5 88/22 89/22</p> <p>hearings [2] 12/23 87/24</p> <p>hearsay [14] 11/10 11/12 11/14 12/2 39/13 40/25 46/21 46/23 47/2 47/3 47/13 47/13 78/4 78/7</p> <p>heightened [1] 83/8</p> <p>held [2] 1/14 1/16</p> <p>help [1] 9/23</p> <p>helpful [1] 52/9</p> <p>her [8] 30/17 30/18 30/21 34/10 44/7 50/6 56/18 75/18</p> <p>here [42] 5/24 8/19 12/5 12/7 14/16 18/13 26/18 33/19 33/21 35/21 37/18 38/8 40/16 45/4 46/8 47/9 47/23 48/9 52/6 54/17 56/17 57/21 58/9 65/22 70/22 72/19 72/24 73/9 74/15 77/20 78/16 79/4 80/1 80/8 80/18 80/20 80/24 80/25 81/24 82/3 82/3 83/23</p> <p>hereby [1] 90/5</p> <p>Hernandez [3] 62/20 63/2 63/4</p> <p>hey [1] 21/7</p> <p>high [2] 6/17 8/19</p> <p>highest [2] 8/18 82/16</p> <p>highlighted [1] 49/21</p> <p>highlighting [1] 49/17</p> <p>him [32] 4/3 7/23 8/4 8/6 8/8 8/19 8/20 10/25 12/5 27/19 27/20 28/16 30/24 30/24 31/7 32/19 34/8 36/1 36/7 40/14 43/18 47/11 48/21 48/22 51/23 56/4 56/17 56/19 57/3 62/21 65/25 67/18</p> <p>himself [9] 11/9 11/16 38/23 40/19 41/1 47/9 49/14 49/18 58/4</p> <p>hindered [2] 15/10 60/21</p> <p>hired [1] 37/6</p> <p>his [72] 3/11 7/18 7/18 7/23 7/25 8/2 8/6 10/24 12/6 14/12 14/15 14/15 14/19 22/12 22/13 22/21 22/21 27/2 27/3 27/10 27/17 27/18 27/20 28/8 29/18 30/9 31/16 33/6 35/21 37/15 37/15 38/14 40/12 40/12 40/13 40/16 41/15 41/22 46/16 46/21 49/19 51/5 51/11 51/11 51/12 51/15 51/16 51/17 55/24 56/23 57/5 57/5 60/14 60/15 60/19 60/23 62/25 66/2 66/4 66/6 66/20 67/5 67/7 67/8 67/9 67/17 67/20 71/20 71/21 71/22 71/24 71/24</p> <p>history [4] 40/12 48/17 51/5 67/20</p> <p>hit [2] 48/2 48/4</p>
--	---	--

<p>H</p> <p>hoc [1] 74/16</p> <p>hold [3] 8/19 15/7 57/2</p> <p>Honor [37] 3/3 3/9 3/21 3/25 10/1 17/9 17/13 19/3 19/12 21/10 27/22 28/24 29/7 33/18 34/11 35/5 37/20 38/9 46/25 47/7 48/7 48/13 49/24 57/9 57/15 59/1 61/1 61/11 62/2 62/8 62/23 63/6 67/25 72/14 72/18 87/16 89/20</p> <p>Honorable [1] 1/15</p> <p>hope [1] 84/21</p> <p>hoped [1] 77/6</p> <p>hoping [1] 86/2</p> <p>host [2] 36/19 37/6</p> <p>hotel [2] 24/18 26/17</p> <p>hour [1] 48/10</p> <p>hours [5] 14/15 19/25 20/20 74/2 78/17</p> <p>hours' [1] 74/8</p> <p>Houston [5] 1/16 1/23 2/6 23/15 90/22</p> <p>how [15] 10/2 15/23 19/17 21/25 26/4 27/16 28/3 38/22 49/10 61/4 62/15 85/2 87/9 88/5 88/22</p> <p>however [7] 12/18 19/5 23/11 43/4 43/11 65/4 66/21</p> <p>huh [1] 23/18</p> <p>hurrying [2] 32/25 57/24</p> <p>Hutchins [9] 2/2 3/17 17/3 18/9 26/13 29/1 44/11 45/18 46/18</p> <p>hypothetical [5] 20/3 21/22 22/1 25/18 26/7</p>	<p>66/3</p> <p>indication [1] 28/15</p> <p>ineffective [21] 5/7 6/9 19/6 29/9 33/2 43/12 43/13 48/25 57/17 58/1 63/15 72/22 73/13 74/5 75/15 77/12 77/18 78/14 82/20 82/25 83/10</p> <p>influence [6] 4/12 4/13 19/9 20/16 22/2 26/14</p> <p>influenced [1] 28/18</p> <p>influences [3] 25/11 25/13 32/4</p> <p>inform [1] 27/23</p> <p>informal [1] 20/23</p> <p>information [26] 10/8 12/10 13/21 14/21 15/18 16/13 18/13 36/19 38/21 38/21 38/24 39/2 39/4 39/8 39/12 39/12 40/2 40/3 40/5 40/20 41/2 42/6 46/2 46/14 52/18 73/24</p> <p>informed [1] 20/8</p> <p>initial [4] 4/1 7/6 61/3 74/7</p> <p>inmate [1] 66/24</p> <p>inner [1] 71/24</p> <p>innocence [5] 27/5 29/18 41/8 41/19 42/6</p> <p>innuendo [1] 40/25</p> <p>insight [1] 60/10</p> <p>insinuated [1] 49/11</p> <p>instincting [2] 68/21 69/2</p> <p>instruction [3] 69/10 69/25 70/7</p> <p>instructions [2] 64/19 69/23</p> <p>insulted [1] 56/24</p> <p>intend [1] 79/23</p> <p>interest [2] 6/6 42/22</p> <p>interesting [2] 30/18 32/11</p> <p>interestingly [2] 41/14 56/11</p> <p>interlineate [1] 5/11</p> <p>internal [1] 65/25</p> <p>interpreted [1] 19/16</p> <p>interviewed [4] 39/11 40/5 40/7 51/23</p> <p>interviews [1] 51/24</p> <p>intimidation [1] 19/16</p> <p>introduce [1] 3/7</p> <p>investigate [4] 30/9 51/12 60/15 86/10</p> <p>investigated [4] 43/3 43/15 51/4 51/10</p> <p>investigation [18] 7/24 20/6 26/22 29/16 29/19 29/21 29/22 30/3 30/5 30/7 33/3 36/13 36/15 38/5 40/22 42/2 48/15 51/1</p> <p>investigator [2] 8/11 11/8</p> <p>investigators [4] 37/7 37/7 37/8 41/5</p> <p>involved [2] 33/7 66/23</p> <p>involvement [2] 7/24 8/1</p> <p>is [152]</p> <p>Isbell [4] 8/12 8/18 10/22 10/25</p> <p>isn't [1] 21/19</p> <p>Israel [7] 7/15 9/12 14/2 15/11 41/10 42/4 78/5</p> <p>issue [28] 5/24 19/18 23/8 23/9 25/9 25/22 25/23 26/14 43/1 43/19 43/20 44/3 46/8 49/20 51/18 60/3 60/19 64/8 67/22 70/4 71/17 75/13 75/25 77/3 77/5 80/10 81/8 85/16</p> <p>issue's [1] 23/9</p> <p>issued [1] 76/20</p> <p>issues [37] 22/11 26/4 33/4 33/25 52/25 53/7 53/8 53/11 54/13 54/15 55/2 55/19 62/13 64/12 64/13 64/14 64/22 65/7 72/22 72/25 75/9 75/10 75/14 76/8 76/22 77/8 77/9 77/10 78/18 79/16 80/6 80/8 81/12 81/13 81/16 82/20 86/3</p> <p>it [161]</p> <p>it's [45] 6/2 6/21 9/2 11/8 11/10 11/12 12/4 15/5 15/5 15/25 17/23 19/3 23/25 26/7 28/1 32/6 32/10 43/22 45/4 45/6 45/16 47/16 48/9 48/24 52/16 52/17 58/23 59/3 59/7 60/17 61/4 61/7 67/14 68/10 69/9 69/24 71/7 73/18 75/24 75/25 76/19 77/3 83/9 84/11 84/12</p> <p>its [4] 13/24 22/10 60/7 66/11</p>	<p>AN [2] 1/6 3/11</p> <p>Judge [50] 1/16 10/12 10/13 11/19 13/20 18/1 20/14 20/23 22/7 22/20 24/7 24/24 25/3 25/5 25/7 28/4 29/5 32/18 33/19 34/1 34/24 35/8 35/8 35/11 36/5 36/10 36/11 37/1 42/25 43/25 44/14 44/21 45/4 50/8 50/9 56/22 58/14 58/16 59/14 59/16 63/14 66/10 71/19 75/20 75/23 83/25 85/11 88/20 88/25 89/10</p> <p>Judges [1] 60/1</p> <p>JUDICIAL [1] 1/6</p> <p>jump [1] 19/7</p> <p>Juror [24] 21/9 21/12 21/16 21/22 22/2 22/14 22/23 25/9 25/14 28/1 29/5 33/4 43/3 43/15 43/18 56/11 65/3 68/22 70/15 70/16 71/11 71/18 77/13 80/22</p> <p>Juror's [2] 19/13 71/9</p> <p>Jurors [38] 4/11 19/16 19/20 19/20 20/2 20/3 20/3 20/16 21/1 21/2 21/3 21/20 22/24 22/25 23/4 23/5 25/10 26/23 27/13 27/23 28/18 41/20 41/21 46/20 47/11 56/4 56/10 56/24 57/1 57/4 62/15 63/17 63/19 64/2 64/8 69/23 70/24 71/13</p> <p>Jurors' [2] 26/4 26/11</p> <p>Jury [45] 19/9 20/25 22/1 22/13 22/16 22/22 25/18 25/18 26/23 27/2 27/3 29/11 31/15 31/21 32/3 49/11 49/12 49/17 49/21 52/21 52/23 55/21 56/9 59/12 62/10 62/12 63/6 63/10 63/11 63/21 64/5 64/19 65/2 66/12 67/11 68/12 68/21 69/3 69/9 69/15 69/22 70/6 70/7 80/15 80/19</p> <p>Jury's [1] 70/3</p> <p>Just [73] 5/9 5/10 5/17 6/11 6/20 8/22 8/25 10/3 11/24 13/10 15/8 16/22 17/4 17/22 18/8 18/9 18/13 19/14 21/19 26/3 26/18 28/11 34/13 34/15 35/9 36/21 37/4 37/16 39/17 42/3 43/23 44/2 44/14 45/8 45/18 45/18 47/6 47/16 50/10 50/14 53/10 53/15 56/16 56/22 57/9 57/13 58/24 60/1 60/25 61/2 61/4 62/23 63/11 65/1 68/4 68/6 69/9 72/12 72/18 74/13 78/17 80/12 81/19 83/25 84/2 84/6 84/17 85/16 85/19 88/2 88/14 88/16 88/19</p> <p>justify [1] 52/22</p> <p>Juvenile [2] 51/15 67/20</p>
<p>I</p> <p>I'd [2] 24/6 73/22</p> <p>I'll [8] 5/10 19/2 19/7 21/18 29/8 48/8 79/14 84/22</p> <p>I'm [53] 3/10 5/17 7/6 8/20 8/22 14/25 17/22 18/1 18/22 21/15 25/16 26/18 27/21 29/11 32/4 32/22 32/24 32/25 34/13 34/15 34/16 34/16 43/7 43/24 45/8 45/8 56/3 56/15 57/12 57/13 57/15 57/23 61/1 65/9 65/10 65/11 65/11 65/14 65/15 65/16 65/17 66/14 66/18 80/18 81/3 84/11 85/6 86/13 87/9 88/9 88/12 88/25 89/9</p> <p>I've [10] 7/7 10/6 21/18 37/24 79/19 81/1 81/19 81/20 81/23 81/24</p> <p>IAC [4] 32/22 33/5 34/20 62/9</p> <p>idea [3] 21/24 26/6 56/18</p> <p>identification [11] 30/12 30/17 30/19 31/2 31/5 31/11 31/17 31/19 31/23 37/11 44/18</p> <p>identifications [1] 44/22</p> <p>identified [1] 39/10</p> <p>identifies [1] 40/6</p> <p>identify [1] 7/2</p> <p>illness [1] 51/5</p> <p>immediate [1] 30/19</p> <p>immediately [2] 7/22 55/13</p> <p>impartial [2] 22/13 22/22</p> <p>impeachment [3] 4/5 4/10 9/20</p> <p>impermissibly [4] 44/18 44/22 44/25 45/11</p> <p>important [10] 4/17 12/4 15/5 15/25 20/1 30/4 38/22 48/17 48/23 57/3</p> <p>importantly [2] 27/12 77/11</p> <p>impression [2] 66/12 67/10</p> <p>impressions [1] 26/5</p> <p>improper [2] 63/20 65/2</p> <p>improperly [1] 63/16</p> <p>in-court [1] 44/17</p> <p>inadequate [1] 77/20</p> <p>inadmissible [2] 25/15 78/1</p> <p>inadvertent [1] 13/3</p> <p>inadvertently [1] 65/19</p> <p>incident [4] 19/15 19/16 20/8 66/2</p> <p>incidents [1] 20/24</p> <p>include [2] 4/4 34/8</p> <p>included [4] 14/3 32/21 34/5 90/9</p> <p>including [5] 26/25 37/14 38/18 48/19 63/10</p> <p>inconsistencies [2] 14/14 15/24</p> <p>inconsistent [2] 9/21 12/9</p> <p>incredibly [1] 8/19</p> <p>inculpatory [1] 14/21</p> <p>indeed [3] 83/2 83/2 83/13</p> <p>indicated [4] 18/13 29/15 34/5</p>	<p>J</p> <p>jail [2] 51/16 59/22</p> <p>Jerome [3] 5/11 14/9 14/11</p> <p>job [4] 78/22 82/13 87/8 88/17</p> <p>Joe [1] 45/1</p> <p>joke [1] 39/25</p> <p>Joshua [2] 2/3 3/19</p>	<p>K</p> <p>Karen [1] 42/4</p> <p>Katherine [2] 2/15 3/13</p> <p>keep [3] 19/2 79/14 79/15</p> <p>keeping [1] 79/17</p> <p>keeps [1] 59/21</p> <p>Kegans [1] 45/2</p> <p>kept [1] 38/24</p> <p>kind [4] 39/25 46/7 49/16 85/20</p> <p>kitchen [1] 85/8</p> <p>knew [7] 28/19 30/7 30/23 30/25 40/23 62/13 72/1</p> <p>know [62] 4/18 5/11 5/16 5/18 5/18 6/3 6/12 6/12 9/4 9/6 10/7 11/10 15/18 17/13 21/8 24/2 25/20 27/20 29/1 29/20 30/5 30/16 30/22 30/24 31/1 31/18 32/19 32/20 33/11 34/20 35/20 35/21 36/7 36/22 37/4 43/17 43/22 45/8 47/10 48/21 49/9 52/11 53/7 53/9 56/10 63/7 69/19 69/23 75/5 79/5 79/17 80/25 81/22 81/25 82/12 82/13 82/16 83/4 85/2 86/1 86/14 87/20</p> <p>knowing [1] 9/2</p> <p>knowingly [1] 10/17</p> <p>known [1] 42/2</p> <p>knows [1] 56/3</p>
<p>L</p> <p>La [1] 36/13</p> <p>labor [1] 87/19</p> <p>lack [1] 64/17</p> <p>lacking [1] 50/14</p> <p>laid [1] 59/7</p> <p>Lake [1] 24/16</p> <p>larger [1] 36/12</p> <p>last [4] 31/10 46/2 74/2 84/4</p>		

<p>L</p> <p>law [12] 10/20 11/13 25/8 25/11 60/15 63/15 63/18 63/25 67/22 72/7 76/6 76/9</p> <p>lawyer [1] 81/25</p> <p>lawyers [2] 5/14 5/16</p> <p>leading [2] 9/13 30/25</p> <p>leads [1] 38/20</p> <p>leaning [1] 28/9</p> <p>learned [5] 15/16 15/17 15/20 40/21 42/1</p> <p>least [7] 18/18 35/24 37/24 46/11 47/24 51/6 87/17</p> <p>leave [1] 40/18</p> <p>led [1] 28/22</p> <p>left [2] 66/11 67/11</p> <p>legal [2] 68/1 70/8</p> <p>lengthy [1] 74/25</p> <p>let [5] 5/9 36/21 45/1 47/23 57/12</p> <p>let's [9] 3/6 10/10 34/18 45/7 56/19 57/14 62/4 79/14 79/15</p> <p>letter [1] 67/8</p> <p>letting [1] 65/10</p> <p>level [3] 6/16 6/17 82/24</p> <p>life [4] 59/21 64/8 68/22 69/16</p> <p>light [3] 30/7 51/3 74/1</p> <p>like [27] 5/3 6/15 10/1 10/9 13/18 27/5 35/4 36/22 42/10 45/18 47/25 50/6 53/16 56/24 57/11 61/5 65/14 65/25 72/15 73/22 74/16 74/22 78/8 81/11 83/23 87/12 87/20</p> <p>likes [1] 39/20</p> <p>limit [1] 65/16</p> <p>limitations [1] 23/15</p> <p>limiting [1] 43/24</p> <p>line [3] 71/9 71/12 71/14</p> <p>lines [2] 27/19 28/11</p> <p>lineup [3] 31/17 44/17 45/10</p> <p>list [4] 82/2 82/3 82/3 82/5</p> <p>listening [1] 15/6</p> <p>lists [2] 46/14 76/2</p> <p>little [7] 25/16 29/15 29/19 48/24 64/6 77/2 84/20</p> <p>live [5] 54/14 73/19 77/21 80/3 88/15</p> <p>locate [1] 29/22</p> <p>location [1] 26/17</p> <p>lock [1] 63/19</p> <p>log [1] 14/15</p> <p>long [5] 15/3 23/12 43/22 73/24 73/24</p> <p>look [12] 15/1 24/6 44/4 60/9 64/10 64/23 67/16 73/10 74/19 75/23 77/7 85/10</p> <p>looked [4] 24/16 24/17 52/14 57/4</p> <p>looking [3] 67/5 71/9 83/6</p> <p>lot [2] 43/23 73/24</p> <p>LTC [1] 41/18</p> <p>lunch [2] 20/22 20/22</p>	<p>manner [3] 76/8 76/18 77/25</p> <p>many [6] 9/12 45/24 77/22 77/23 88/1 88/5</p> <p>material [2] 67/15 67/21</p> <p>materiality [1] 67/13</p> <p>may [28] 3/24 5/18 5/21 6/17 6/20 8/23 15/2 16/18 16/23 21/1 22/2 24/19 30/12 34/24 34/25 35/7 37/2 45/9 50/3 53/13 56/21 58/24 61/9 62/1 66/16 67/24 77/8 79/3</p> <p>maybe [2] 36/6 87/21</p> <p>me [28] 4/7 5/9 10/2 10/3 23/20 27/7 36/21 42/10 45/1 53/11 57/14 75/21 79/20 81/23 84/15 84/17 84/21 84/22 85/2 85/8 85/8 85/25 86/10 86/11 88/22 89/3 89/3 90/12</p> <p>mean [11] 20/13 21/13 33/16 47/12 58/11 58/13 58/24 70/13 82/17 84/19 86/1</p> <p>means [1] 21/25</p> <p>Meanwhile [1] 54/8</p> <p>media [1] 26/25</p> <p>meet [1] 64/24</p> <p>meetings [2] 41/12 52/2</p> <p>meetings [4] 9/12 10/23 37/14 37/16</p> <p>members [5] 37/25 38/18 46/10 46/13 54/1</p> <p>memorandum [1] 79/5</p> <p>memorialized [1] 15/20</p> <p>memory [1] 57/19</p> <p>mental [4] 25/10 26/5 37/9 51/5</p> <p>mention [3] 25/21 29/8 46/5</p> <p>mentioned [4] 21/18 26/3 44/11 46/19</p> <p>merit [1] 72/11</p> <p>messages [1] 26/22</p> <p>method [2] 64/5 64/6</p> <p>Mexico [11] 38/16 38/17 50/25 53/20 54/1 54/15 54/19 54/23 55/8 55/10 55/12</p> <p>midst [1] 27/3</p> <p>might [5] 29/3 48/3 49/23 84/19 88/2</p> <p>mind [2] 63/11 72/15</p> <p>minimum [1] 79/15</p> <p>minorities [1] 71/1</p> <p>minority [1] 45/7</p> <p>minute [1] 31/10</p> <p>minutes [1] 35/4</p> <p>misconduct [8] 22/15 22/23 28/1 43/3 43/15 43/18 77/11 77/13</p> <p>miss [1] 48/10</p> <p>missing [1] 60/20</p> <p>mistaken [2] 24/19 66/14</p> <p>mistakes [4] 83/5 83/8 83/12 83/14</p> <p>mistrial [2] 23/3 23/4</p> <p>miti [1] 48/18</p> <p>mitigating [4] 63/18 63/20 65/8 70/8</p> <p>mitigation [18] 37/8 38/13 50/12 50/19 50/24 50/25 54/19 54/23 59/20 62/12 64/1 64/1 64/3 64/10 64/14 64/23 65/4 65/5</p> <p>mode [1] 77/19</p> <p>modified [1] 66/6</p> <p>mom [1] 38/4</p> <p>moment [5] 8/14 18/2 57/18 61/25 62/5</p> <p>months [1] 23/23</p> <p>more [21] 5/15 5/17 7/4 15/21 18/9 20/20 26/7 27/12 35/11 46/3 56/21 62/22 65/11 65/15 71/13 74/8 77/2 79/1 85/20 86/4 87/5</p> <p>morning [3] 3/22 23/16 24/1</p> <p>most [4] 6/2 21/1 77/10 79/16</p> <p>motel [5] 19/11 23/14 24/11 24/14 81/21</p> <p>mother [6] 37/15 38/7 38/11 38/15 51/17 54/8</p> <p>motion [36] 12/19 23/3 32/16 32/22 33/5 33/24 34/4 43/4 43/15 58/4 59/5 59/9 59/17 60/5 60/19 60/23 72/5 74/20 74/22 74/23 74/23 75/3 75/4 78/17 79/9 79/10 79/11 81/10 81/13 85/13 85/22 86/4 86/6 86/16 87/12 88/16</p> <p>motions [2] 79/5 86/22</p> <p>motive [1] 52/20</p> <p>motives [2] 41/11 41/13</p> <p>move [4] 23/3 34/21 56/20 86/21</p> <p>moving [1] 85/22</p>	<p>[5] 2/3 4/6 5/11 41/14 68/12</p> <p>Mr. [106]</p> <p>Mr. Balderas [22] 3/15 4/16 4/18 6/22 7/22 7/23 8/3 8/4 9/8 29/23 30/14 30/19 30/23 31/2 32/12 37/4 49/14 68/19 71/16 71/16 73/9 77/16</p> <p>Mr. Balderas' [12] 4/2 5/6 7/17 8/1 33/12 48/17 49/3 49/15 68/15 68/19 70/1 70/5</p> <p>Mr. Benitez [5] 41/9 41/15 41/17 41/22 46/20</p> <p>Mr. Diaz [12] 4/6 7/25 9/7 10/24 10/25 11/6 11/9 11/16 12/4 12/10 41/12 41/14</p> <p>Mr. Diaz's [3] 11/2 11/4 14/22</p> <p>Mr. Godinich [14] 15/14 17/6 33/9 34/3 39/15 39/18 41/14 45/25 46/12 47/10 60/10 76/20 81/24 84/3</p> <p>Mr. Godinich's [3] 54/2 55/6 64/4</p> <p>Mr. Hernandez [2] 62/20 63/2</p> <p>Mr. Isbell [4] 8/12 8/18 10/22 10/25</p> <p>Mr. Juan [1] 3/11</p> <p>Mr. Malpass [2] 31/16 42/13</p> <p>Mr. Nunnery [13] 14/17 17/6 33/10 34/3 39/15 41/3 55/24 60/10 60/18 69/14 71/22 76/21 84/3</p> <p>Mr. Nunnery's [5] 39/18 46/1 55/20 63/23 71/7</p> <p>Mr. Reiss [1] 18/3</p> <p>Mr. Shearer [7] 33/2 33/11 34/5 43/1 43/3 47/11 47/12</p> <p>Ms [4] 2/2 2/4 2/14 2/15</p> <p>Ms. [10] 17/3 17/6 18/9 26/13 29/1 44/11 45/18 46/18 47/23 72/16</p> <p>Ms. Black [1] 72/16</p> <p>Ms. Farnaz [2] 17/6 47/23</p> <p>Ms. Hutchins [7] 17/3 18/9 26/13 29/1 44/11 45/18 46/18</p> <p>much [11] 19/19 32/25 33/21 41/24 48/8 50/10 50/13 57/21 65/17 77/1 89/19</p> <p>multiple [3] 27/2 37/14 51/23</p> <p>Munoz [3] 42/5 44/10 44/12</p> <p>murder [12] 5/15 6/16 7/19 8/7 14/3 18/12 18/14 35/14 35/15 35/22 36/1 36/1</p> <p>murders [5] 35/16 35/25 36/4 36/4 67/19</p> <p>my [15] 3/3 3/9 19/13 38/24 38/25 53/15 56/18 57/19 64/7 66/19 72/16 81/19 85/11 88/12 90/16</p> <p>myself [1] 81/2</p> <p>N</p> <p>name [4] 3/9 24/9 46/14 89/3</p> <p>namely [2] 10/22 76/9</p> <p>names [3] 38/21 38/23 68/8</p> <p>nature [3] 48/24 59/18 68/1</p> <p>nearly [1] 57/18</p> <p>necessary [9] 4/23 4/24 6/23 33/23 47/7 57/3 70/11 71/23 73/16</p> <p>need [13] 4/24 25/18 32/25 48/9 57/21 61/12 63/9 64/22 65/17 72/21 74/4 83/8 84/16</p> <p>needed [2] 60/15 61/23</p> <p>needs [1] 75/13</p> <p>neither [1] 46/13</p> <p>never [8] 8/4 8/15 16/10 21/5 30/22 33/10 60/12 60/16</p> <p>new [7] 32/16 33/5 43/4 43/16 50/25 60/15 88/12</p> <p>next [7] 18/25 19/25 23/16 24/1 29/6 87/24 88/1</p> <p>nicely [1] 46/8</p> <p>nich [1] 39/21</p> <p>night [11] 7/20 7/21 8/3 9/14 23/14 24/2 24/18 24/19 29/24 30/20 46/2</p> <p>nine [1] 88/10</p> <p>no [36] 1/2 1/22 2/2 2/3 2/4 2/14 2/15 15/3 17/19 21/9 23/21 28/13 28/14 28/17 36/5 42/16 43/18 51/14 55/25 60/6 60/6 60/20 61/18 64/18 65/16 67/10 69/4 70/10 70/14 70/15 70/21 70/23 71/16 72/2 80/18 85/24</p> <p>No. [4] 3/7 3/21 15/13 72/3</p> <p>No. 11 [1] 72/3</p> <p>No. 1412826-A [1] 3/7</p>
---	--	--

EXHC

N

No. 24053738 [1] 3/21
 No. 56 [1] 15/13
 Nobody [1] 84/7
 None [1] 28/6
 not [146]
 note [1] 4/17
 noted [3] 10/20 26/13 29/1
 notes [25] 5/10 9/11 9/15 12/14
 12/16 12/21 12/24 13/4 14/1 14/2
 14/8 14/11 14/12 14/14 14/18
 14/21 14/22 14/24 15/1 15/2 15/6
 16/10 17/7 51/24 52/10
 nothing [3] 16/25 39/6 40/23
 notice [3] 15/23 36/18 74/8
 noticed [1] 7/7
 notification [1] 85/17
 now [29] 6/8 7/24 11/6 13/5 14/9
 15/19 17/25 23/8 25/6 26/19 39/9
 40/6 41/25 43/2 43/16 48/3 48/5
 50/7 50/14 50/15 53/4 53/9 70/25
 72/8 73/17 73/18 77/6 79/25 84/25
 number [4] 4/2 5/25 37/23 49/25
 numbered [2] 1/15 90/10
 numbers [1] 38/21
 numerous [1] 74/24
 Nunnery [15] 5/12 14/10 14/17
 17/6 33/10 34/3 39/15 41/3 55/24
 60/10 60/18 69/14 71/22 76/21
 84/3
 Nunnery's [5] 39/18 46/1 55/20
 63/23 71/7

O

o'clock [1] 48/10
 oath [2] 12/7 57/2
 object [2] 49/1 70/19
 objected [2] 53/3 60/16
 objecting [1] 53/6
 objection [4] 53/2 85/13 85/14
 87/22
 objections [3] 7/2 7/5 87/13
 obligation [1] 83/16
 obtain [1] 29/22
 obviously [2] 4/20 45/25
 occurred [8] 25/1 25/2 25/12
 30/25 31/3 66/2 69/20 90/11
 OCFW [2] 89/17 89/18
 ODI [1] 33/24
 off [18] 4/10 5/4 6/24 10/19
 13/20 18/2 24/24 39/13 52/1 55/14
 64/7 67/21 70/16 70/24 71/3 71/13
 72/15 84/1
 offense [1] 42/21
 offenses [3] 36/17 36/24 59/22
 offer [2] 27/15 59/21
 offered [1] 90/15
 office [26] 2/5 2/16 3/10 3/14
 3/20 14/5 14/13 14/17 16/7 16/9
 17/1 38/19 66/23 67/1 67/9 67/10
 74/19 84/1 84/5 87/25 88/1 88/7
 88/8 88/12 89/5 89/16
 officer [2] 65/22 66/1
 official [4] 1/22 90/3 90/16
 90/20
 often [2] 6/5 77/25
 oh [3] 69/11 69/13 88/21
 okay [32] 4/6 7/14 8/21 11/17
 13/16 22/6 27/9 34/15 34/18 37/4
 37/21 45/16 47/4 48/6 56/14 57/20
 57/22 60/24 61/14 61/17 61/21
 66/9 68/10 69/18 72/13 88/11
 88/17 88/24 89/9 89/11 89/14
 89/18
 old [1] 62/20
 once [3] 85/1 85/12 85/15
 one [49] 9/24 9/24 10/4 10/4
 10/10 11/2 14/7 14/23 17/25 18/2
 18/8 22/11 23/12 26/23 27/13
 27/18 28/13 29/6 30/13 30/14
 32/11 33/8 35/9 35/22 36/8 44/7
 44/15 45/2 46/8 47/2 48/23 55/4
 56/6 57/13 60/14 65/19 67/16
 68/22 69/5 69/6 69/15 71/8 71/11
 77/20 79/17 80/19 82/10 82/14
 82/17
 ones [6] 47/25 48/3 70/14 74/13
 81/19 85/9
 only [25] 10/8 11/23 17/15 19/22
 22/1 27/17 32/20 33/6 34/2 34/7
 35/13 45/3 45/6 46/16 48/3 48/9
 60/1 67/14 70/14 78/17 82/1 82/4
 82/15 84/12 87/17

open [11] 3/1 13/25 32/6 32/9
 42/7 42/17 42/20 44/13 69/12
 79/18 90/11
 opening [2] 31/24 32/9
 openness [1] 16/1
 opinion [8] 22/10 42/14 44/16
 44/24 45/5 45/6 45/7 81/19
 opinions [4] 27/16 44/19 49/12
 82/23
 opportunity [11] 4/22 4/25 6/24
 17/20 57/16 73/7 74/8 74/16 74/22
 78/11 81/9
 oppose [1] 74/22
 opposed [1] 73/21
 opposing [1] 25/17
 opposition [5] 75/3 79/12 79/14
 81/10 85/21
 options [2] 23/21 79/18
 oral [1] 34/4
 order [15] 19/4 32/4 33/24 34/1
 34/7 34/25 35/1 73/23 75/24 76/20
 76/22 76/23 76/25 85/16 85/17
 ordered [2] 40/18 76/20
 organization [1] 89/3
 originally [1] 23/19
 other [26] 5/16 13/4 20/5 25/20
 28/17 28/18 35/16 35/25 36/3 39/9
 42/3 42/17 46/9 46/13 46/17 50/16
 50/19 50/20 51/13 53/11 66/17
 72/24 77/8 82/24 87/24 90/7
 others [2] 30/2 34/21
 otherwise [1] 76/24
 our [55] 4/19 4/23 4/25 7/2 7/24
 8/11 9/16 9/17 10/12 11/18 12/3
 12/10 15/22 16/9 16/13 20/6 25/14
 26/15 26/22 27/13 29/14 29/21
 30/8 32/21 43/20 47/8 59/2 59/11
 61/7 62/3 67/10 68/4 70/13 72/10
 72/19 73/17 73/18 73/25 74/19
 75/15 77/9 78/4 78/5 81/9 82/24
 83/4 83/25 85/13 85/14 86/5 87/5
 88/3 88/7 88/8 89/8
 out [25] 8/25 14/20 15/5 15/25
 17/15 19/3 19/14 20/25 23/17
 34/25 36/15 41/2 46/6 47/23 54/10
 55/9 57/10 59/7 61/2 67/20 75/7
 82/5 84/5 86/21 87/25
 outside [6] 25/11 25/13 26/5
 31/15 88/3 88/15
 overruled [2] 72/5 72/6
 overruling [3] 22/10 23/2 60/5
 own [4] 4/25 7/18 19/22 67/6

P

packets [1] 59/20
 page [2] 46/11 86/10
 pages [2] 9/11 51/7
 pair [1] 5/16
 panel [1] 80/15
 paper [1] 73/21
 paragraph [1] 84/20
 pare [3] 80/12 84/16 85/9
 paring [2] 81/6 86/3
 parse [1] 36/15
 part [2] 19/11 50/3
 Parte [1] 9/3
 partiality [1] 28/9
 particular [2] 26/4 66/12
 parties [4] 5/19 6/12 90/8 90/15
 parts [1] 87/24
 party [1] 32/20
 passenger [1] 19/10
 past [2] 24/15 81/25
 penalty [1] 5/3
 pendency [4] 16/2 16/16 22/7
 59/25
 pending [1] 16/2
 people [12] 27/15 28/17 46/17
 54/5 80/15 80/23 82/1 82/2 82/3
 82/4 82/5 82/15
 perceiving [1] 20/4
 perceptions [1] 21/23
 performance [1] 63/8
 perhaps [1] 81/14
 period [2] 22/8 40/15
 perjured [2] 55/15 55/16
 permitted [1] 58/22
 person [5] 12/7 17/3 34/17 80/20
 81/21
 personal [1] 55/25
 personally [1] 14/12
 personnel [2] 65/25 66/5
 persuade [1] 59/20

ertain [1] 7/15
 pertained [1] 62/9
 petition [4] 72/25 80/6 80/8
 81/14
 phase [20] 29/10 29/15 30/2 32/22
 34/20 47/19 48/14 48/18 49/2
 49/25 50/5 51/9 53/12 53/24 53/25
 62/10 62/15 63/10 65/21 70/6
 phone [1] 38/21
 photographs [1] 40/14
 physical [1] 52/3
 PIA [2] 16/12 17/1
 pick [2] 20/25 81/18
 picked [1] 23/14
 picking [1] 59/22
 piece [1] 48/18
 pin [1] 65/3
 pioneered [2] 6/16 82/9
 place [2] 7/23 24/9
 places [1] 23/22
 pleading [3] 73/6 77/15 79/25
 pleadings [4] 73/5 76/10 77/14
 78/25
 please [4] 18/4 45/9 73/12 81/20
 plenty [2] 11/13 46/23
 point [36] 4/17 7/3 8/25 12/13
 15/5 15/19 15/25 16/22 17/14 18/7
 18/9 18/25 19/14 21/9 21/18 21/19
 29/7 30/11 44/2 44/12 45/19 46/6
 46/15 47/12 49/10 57/10 60/25
 61/2 65/1 65/19 70/18 72/15 73/2
 73/22 75/7 85/15
 pointed [1] 14/20
 points [8] 29/9 33/8 39/18 48/5
 51/8 51/21 52/25 56/25
 police [2] 30/21 31/5
 policies [1] 66/23
 portions [1] 90/7
 position [8] 12/4 13/5 27/20 30/8
 73/18 73/18 77/9 83/4
 positions [1] 12/14
 positive [1] 51/11
 possession [1] 9/19
 possible [4] 6/23 9/6 51/3 87/17
 post [17] 3/12 7/24 9/9 11/4 11/7
 13/2 13/10 16/4 16/8 16/13 17/4
 18/17 25/22 25/24 27/17 47/18
 72/9
 post-conviction [12] 3/12 7/24
 11/4 11/7 13/2 16/4 16/8 16/13
 17/4 18/17 47/18 72/9
 post-trial [1] 13/10
 posted [1] 28/17
 posts [7] 26/23 27/2 27/10 27/17
 28/6 28/6 28/19
 potential [6] 30/1 39/5 62/15
 65/3 65/5 70/16
 potentially [2] 71/13 85/13
 power [2] 34/14 78/8
 powers [1] 45/22
 practice [2] 82/6 82/18
 practiced [2] 81/23 81/23
 preferred [1] 50/16
 prejudice [1] 28/5
 prep [1] 14/15
 prepared [1] 14/4
 prescribed [1] 69/25
 presence [1] 31/15
 present [15] 3/1 3/5 3/15 12/11
 18/3 20/24 30/15 31/14 48/20 51/2
 65/10 79/1 80/9 84/18 85/2
 presented [14] 10/17 10/18 42/2
 42/3 49/3 50/13 50/19 50/20 51/4
 51/8 51/10 51/15 51/16 62/14
 presenting [2] 55/14 78/23
 preserve [6] 60/19 60/23 61/8
 61/12 68/3 72/16
 preserving [1] 61/19
 Presiding [1] 1/16
 pressure [1] 10/24
 presumably [3] 13/9 47/13 69/23
 pretrial [13] 14/12 14/18 15/8
 15/15 15/17 15/18 16/6 17/11
 29/10 44/17 58/2 72/4 72/4
 pretty [2] 62/24 69/24
 prevailing [5] 10/19 25/8 63/14
 67/22 72/7
 previous [1] 72/20
 previously [5] 17/2 72/6 72/20
 73/14 74/3
 primary [2] 19/18 72/19
 prior [7] 9/21 12/9 17/2 20/8
 72/19 74/3 75/14

<p>P</p> <p>prison [1] 37/10</p> <p>privileged [2] 12/24 16/18</p> <p>pro [3] 58/4 59/5 60/14</p> <p>probably [6] 5/15 6/13 18/20 41/22 84/13 85/3</p> <p>problematic [1] 30/18</p> <p>problems [6] 5/25 7/2 7/7 31/17 31/22 46/6</p> <p>procedurally [3] 23/9 53/4 72/8</p> <p>procedures [4] 31/5 31/8 31/18 31/23</p> <p>proceed [2] 34/18 58/23</p> <p>proceeded [1] 36/8</p> <p>proceeding [1] 33/8</p> <p>proceedings [7] 1/14 1/18 3/12 13/8 49/2 90/7 90/14</p> <p>process [9] 5/2 22/13 22/22 26/12 68/16 75/1 75/17 78/15 80/7</p> <p>processes [1] 25/10</p> <p>produce [1] 84/21</p> <p>product [3] 12/24 12/25 13/14</p> <p>proffer [1] 86/12</p> <p>prohibited [3] 68/21 69/2 69/14</p> <p>promises [1] 86/13</p> <p>prong [1] 64/25</p> <p>proof [2] 4/18 4/19</p> <p>proper [3] 46/10 81/2 82/11</p> <p>proposed [1] 41/25</p> <p>prosecutor [2] 9/2 53/1</p> <p>prosecutorial [1] 77/11</p> <p>prosecutors [7] 8/6 8/14 11/2 14/7 16/12 56/6 60/2</p> <p>prospective [2] 63/17 70/24</p> <p>protection [2] 68/13 68/16</p> <p>protector [1] 51/12</p> <p>prove [4] 4/23 73/8 73/8 78/9</p> <p>proven [2] 4/15 77/16</p> <p>provide [4] 29/23 33/11 40/4 87/4</p> <p>provided [18] 4/5 9/7 12/11 12/25 13/1 13/13 17/8 17/24 18/15 18/17 19/17 21/3 41/7 41/9 41/10 56/10 74/6 78/4</p> <p>providing [1] 77/4</p> <p>provision [1] 58/9</p> <p>public [1] 16/12</p> <p>pull [2] 35/9 72/17</p> <p>punishment [26] 29/10 30/2 35/17 47/19 48/13 48/18 49/2 49/20 49/25 50/4 50/11 51/9 53/12 53/24 53/25 56/19 58/13 62/14 63/10 64/20 65/21 66/6 67/18 68/17 70/6 83/17</p> <p>purport [1] 46/9</p> <p>purporting [2] 46/15 52/23</p> <p>purports [1] 41/3</p> <p>pursuant [2] 25/7 70/17</p> <p>pursue [2] 38/20 59/23</p> <p>pursued [1] 39/5</p> <p>push [1] 86/21</p> <p>put [20] 4/22 4/25 18/14 21/5 32/8 35/16 41/6 47/22 48/16 50/10 50/11 50/12 50/14 50/16 68/7 83/23 84/20 88/2 88/3 88/16</p> <p>putting [2] 59/19 81/6</p>	<p>rather [3] 21/20 49/14 49/18</p> <p>reached [2] 4/14 21/8</p> <p>react [2] 55/17 62/16</p> <p>reaction [1] 65/6</p> <p>reactions [3] 21/4 52/3 52/4</p> <p>read [3] 56/2 79/6 79/14</p> <p>reading [1] 75/6</p> <p>ready [1] 62/7</p> <p>Reagan [4] 1/22 90/3 90/18 90/19</p> <p>Reagin [1] 2/4</p> <p>real [3] 7/13 15/3 26/2</p> <p>realize [4] 6/11 8/17 17/13 56/16</p> <p>really [8] 6/2 30/18 73/3 78/17 80/12 83/3 83/10 87/9</p> <p>realm [1] 64/24</p> <p>reason [5] 11/5 28/25 32/2 59/8 88/13</p> <p>reasonable [7] 30/6 30/7 42/2 48/15 63/8 64/15 87/15</p> <p>reasons [8] 23/13 27/13 53/5 60/11 71/18 72/10 77/20 77/23</p> <p>rebut [4] 50/21 50/22 65/11 73/25</p> <p>rebutts [1] 65/10</p> <p>rebuttal [3] 9/24 10/9 45/14</p> <p>rebutting [1] 78/23</p> <p>recall [2] 30/13 34/11</p> <p>recantation [1] 12/6</p> <p>recanted [1] 8/2</p> <p>receipt [1] 17/15</p> <p>receive [1] 86/9</p> <p>recent [3] 82/21 82/22 82/22</p> <p>Recess [1] 62/6</p> <p>recollection [2] 55/25 76/13</p> <p>record [43] 1/1 3/2 3/6 4/11 4/15 5/5 6/24 15/9 18/2 18/5 18/7 20/7 20/25 21/5 24/1 26/9 31/25 33/3 33/21 34/6 37/6 41/24 42/10 44/5 44/5 47/23 48/16 50/9 50/17 53/3 54/25 55/24 61/13 68/4 68/7 71/23 71/25 74/12 76/11 83/24 84/2 90/9 90/13</p> <p>recordings [2] 51/25 52/11</p> <p>recounting [1] 21/4</p> <p>rectify [1] 83/16</p> <p>redirect [1] 67/2</p> <p>reduced [1] 7/19</p> <p>refer [1] 68/4</p> <p>reflect [5] 14/15 15/9 37/6 38/1 38/2</p> <p>reflected [1] 22/23</p> <p>reflects [1] 90/14</p> <p>refused [1] 11/16</p> <p>refutes [1] 11/2</p> <p>regarding [13] 12/9 17/20 18/11 19/8 26/21 27/2 42/12 45/17 48/16 48/21 49/3 59/8 78/5</p> <p>Regardless [1] 19/18</p> <p>regularly [1] 62/25</p> <p>rehire [1] 67/3</p> <p>reinforces [1] 40/2</p> <p>reinstatement [1] 67/9</p> <p>Reiss [3] 2/3 3/19 18/3</p> <p>reiterate [1] 45/19</p> <p>reiterated [1] 49/19</p> <p>related [1] 81/17</p> <p>relating [1] 77/11</p> <p>relationship [2] 40/12 40/13</p> <p>relaying [1] 54/24</p> <p>released [1] 70/24</p> <p>relevant [2] 80/4 86/4</p> <p>reliability [1] 83/15</p> <p>reliable [1] 73/19</p> <p>relied [1] 65/20</p> <p>relief [6] 4/4 4/16 9/8 31/7 73/9 77/16</p> <p>rely [4] 29/20 52/21 72/12 78/7</p> <p>relying [4] 5/25 11/6 25/14 73/25</p> <p>remaining [2] 57/17 68/1</p> <p>remedy [1] 58/20</p> <p>remember [6] 10/11 30/4 33/20 44/9 45/1 49/9</p> <p>remembering [1] 27/8</p> <p>remind [1] 57/1</p> <p>render [1] 67/1</p> <p>rendered [1] 22/10</p> <p>Renee [4] 1/22 90/3 90/18 90/19</p> <p>repeated [1] 26/25</p> <p>repeatedly [1] 62/25</p> <p>reported [4] 1/18 8/10 69/7 90/12</p> <p>reporter [4] 1/22 24/22 90/3 90/20</p> <p>reporter's [4] 1/1 44/4 90/9 90/13</p>	<p>reports [1] 49/12</p> <p>represent [2] 3/8 3/11</p> <p>representations [3] 13/7 16/25 45/22</p> <p>represented [1] 12/22</p> <p>representing [4] 3/15 3/18 12/22 32/12</p> <p>request [5] 18/18 81/9 87/17 88/2 88/14</p> <p>requested [2] 34/3 90/8</p> <p>requesting [3] 4/22 7/3 45/21</p> <p>require [8] 9/2 9/4 45/20 72/25 73/11 80/6 80/7 87/25</p> <p>required [1] 63/12</p> <p>requires [3] 5/2 75/1 75/17</p> <p>requiring [1] 82/11</p> <p>rescinding [1] 17/17</p> <p>research [1] 64/6</p> <p>reset [1] 60/17</p> <p>resolvable [1] 67/23</p> <p>resolve [4] 10/13 76/4 76/7 76/19</p> <p>resolved [3] 10/19 23/10 75/13</p> <p>resource [1] 43/9</p> <p>respect [1] 75/15</p> <p>respectfully [2] 42/11 61/12</p> <p>respective [1] 90/15</p> <p>respond [20] 7/5 13/19 16/23 26/2 27/18 28/16 46/4 47/23 50/6 65/6 65/14 74/8 75/2 78/19 79/10 79/21 81/9 84/24 84/25 88/21</p> <p>responded [2] 4/21 41/20</p> <p>responding [1] 5/6</p> <p>response [9] 10/13 33/12 70/13 85/14 86/5 86/16 86/16 89/8 89/15</p> <p>responses [6] 11/19 46/1 53/14 53/15 79/4 84/23</p> <p>responsibility [1] 61/7</p> <p>responsible [2] 16/5 32/15</p> <p>restricted [1] 70/7</p> <p>result [2] 66/2 68/22</p> <p>retained [1] 31/12</p> <p>return [2] 20/22 72/18</p> <p>reverend [1] 50/24</p> <p>reversal [1] 83/19</p> <p>review [18] 6/25 7/4 9/16 12/18 14/9 14/13 29/14 30/13 46/3 61/13 66/4 76/10 76/10 76/11 76/13 79/18 83/7 85/15</p> <p>reviewed [5] 14/11 14/12 14/24 45/18 46/12</p> <p>reviewing [2] 14/16 82/24</p> <p>right [24] 3/24 6/8 8/9 19/3 22/13 22/21 22/22 26/20 33/17 36/4 43/18 43/20 47/17 48/3 48/5 49/16 53/9 59/3 60/7 62/3 65/9 70/22 83/8 84/25</p> <p>rights [5] 22/13 22/16 60/19 60/23 68/20</p> <p>road [1] 88/15</p> <p>Rodeo [1] 23/15</p> <p>rodeo's [1] 23/21</p> <p>role [2] 33/6 51/11</p> <p>Roll [1] 1/15</p> <p>room [1] 20/25</p> <p>roughly [1] 30/24</p> <p>round [1] 66/24</p> <p>Roy [1] 31/12</p> <p>Rule [1] 25/8</p> <p>ruled [1] 42/13</p> <p>rules [2] 16/14 79/11</p> <p>ruling [7] 31/20 42/12 42/16 43/17 44/3 44/7 75/18</p> <p>rush [1] 48/10</p> <p>rush-hour [1] 48/10</p>
<p>Q</p> <p>qualify [2] 25/13 26/18</p> <p>question [2] 7/21 28/2</p> <p>questioned [2] 21/6 23/4</p> <p>questioning [2] 54/17 55/8</p> <p>questionnaire [1] 70/25</p> <p>questionnaires [1] 64/13</p> <p>questions [3] 55/2 77/25 78/20</p> <p>quick [2] 26/2 75/6</p> <p>quickly [2] 7/9 7/13</p> <p>quite [1] 34/23</p>	<p>R</p> <p>R-E-I-S-S [1] 3/19</p> <p>race [2] 70/16 71/3</p> <p>raise [10] 33/9 57/25 58/18 61/5 61/6 74/20 75/8 77/8 77/15 77/24</p> <p>raised [21] 4/2 6/4 9/19 22/11 29/8 53/8 53/9 53/12 59/2 59/6 59/12 60/3 61/7 62/9 62/10 72/4 72/6 72/25 75/11 78/21 79/20</p> <p>raises [2] 64/13 70/19</p> <p>raising [5] 61/2 72/8 82/25 83/6 83/9</p> <p>Randy [1] 1/15</p> <p>ratcheted [1] 88/13</p>	<p>S</p> <p>safety [2] 19/22 19/23</p> <p>said [23] 8/2 9/7 13/11 13/24 14/11 17/6 18/9 23/5 26/3 31/1 45/10 45/10 45/11 46/20 56/17 60/6 61/1 69/7 76/3 76/22 80/16 80/17 80/22</p> <p>same [11] 21/23 30/20 33/16 33/22 34/14 34/17 45/4 50/13 74/13 75/2 78/13</p> <p>save [1] 53/15</p> <p>saw [1] 46/20</p> <p>say [30] 5/9 8/5 8/8 8/22 11/5 11/13 14/10 15/8 17/5 17/7 17/7 17/10 21/9 21/12 27/4 28/21 36/21 39/20 40/20 40/22 45/11 45/24 52/20 52/25 72/1 75/22 75/23 79/16 79/17 82/12</p>

S		
saying [20]	8/13 13/10 16/10 27/18 27/22 32/8 34/13 36/23 42/18 43/2 43/2 45/2 47/5 47/10 68/25 69/12 71/2 76/1 83/11 84/5	
says [14]	14/7 14/17 30/21 41/25 46/12 50/15 55/7 60/18 63/19 71/7 76/5 76/7 76/15 80/21	
SBOT [5]	2/2 2/3 2/4 2/14 2/15	
scope [1]	26/6	
Scott [2]	32/13 32/15	
se [3]	58/4 59/5 60/14	
second [6]	9/3 24/2 24/18 24/19 76/6 82/2	
see [12]	8/3 8/7 8/9 13/18 15/1 16/21 18/19 18/23 25/5 41/16 43/10 64/11	
seedy [1]	19/11	
seeking [1]	68/2	
seems [1]	29/18	
seen [4]	7/22 15/2 16/8 30/22	
selecting [1]	63/11	
selection [9]	29/11 59/13 62/10 62/12 63/7 63/10 63/21 64/5 65/3	
send [2]	85/2 87/5	
sends [1]	20/23	
sense [1]	6/2	
sentence [6]	68/15 68/22 69/16 70/1 70/5 83/15	
separation [1]	67/8	
September [1]	86/20	
serious [2]	28/3 79/16	
served [1]	74/10	
service [3]	27/2 27/3 84/4	
set [2]	63/20 86/15	
seven [2]	50/23 76/21	
several [3]	77/10 77/20 79/19	
severity [1]	83/17	
sexual [4]	49/4 49/6 62/17 63/18	
sexually [1]	62/25	
Shawna [1]	2/4	
she [40]	9/23 18/11 18/12 20/11 20/19 20/23 21/2 26/3 26/3 30/16 30/21 30/21 30/22 30/23 30/25 31/1 31/1 31/2 31/20 34/5 34/6 34/23 37/18 38/8 39/7 40/9 44/6 44/9 44/11 45/2 45/3 45/4 45/25 46/5 61/1 65/10 65/14 80/22 80/22 81/2	
she's [6]	10/5 30/20 37/19 55/18 74/13 87/19	
Shearer [9]	32/14 32/15 33/2 33/11 34/5 43/1 43/3 47/11 47/12	
sheet [2]	66/25 66/25	
sheriff's [4]	66/22 67/1 67/8 67/9	
shooter [3]	30/22 31/1 41/10	
shooting [8]	7/21 7/22 8/3 9/15 9/15 30/16 30/20 30/25	
short [2]	55/8 56/19	
should [20]	16/17 17/19 18/22 27/16 27/21 27/23 43/3 43/15 47/22 48/2 48/4 49/11 52/21 59/12 70/6 75/21 80/12 85/3 86/15 86/17	
shouldn't [2]	21/10 47/14	
show [5]	28/5 37/13 38/3 64/17 70/15	
showed [1]	39/2	
shows [5]	25/12 41/24 50/9 58/8 66/5	
sic [1]	20/15	
side [4]	10/9 23/24 28/9 55/23	
sides [2]	28/12 78/11	
sifting [1]	36/20	
sign [4]	11/16 41/18 46/20 87/5	
signed [1]	34/7	
similarly [1]	13/4	
simply [1]	5/22	
since [1]	41/16	
single [2]	52/19 71/18	
sink [1]	85/8	
sir [2]	4/7 24/23	
sit [3]	35/3 35/4 35/9	
site [1]	32/1	
sitting [4]	26/23 27/16 58/14 84/8	
situated [1]	13/4	
situation [2]	11/15 24/4	
situations [1]	71/12	
six [2]	59/22 76/21	
sixth [1]	59/3	
skipped [1]	65/19	
Skype [3]	53/19 54/11 54/16	
small [1]	62/17	
social [2]	26/25 48/17	
solely [3]	47/8 77/18 78/7	
some [43]	5/6 5/10 6/24 7/6 15/15 15/16 15/18 15/21 15/23 18/13 29/24 33/4 39/17 40/20 41/1 42/6 49/8 53/18 53/19 54/2 54/14 55/19 55/20 55/22 56/10 60/10 61/9 65/24 66/17 70/18 72/23 73/10 76/5 76/6 76/9 76/9 76/10 76/11 76/12 76/13 80/5 88/3 88/14	
somebody [2]	69/12 71/13	
someone [3]	26/19 56/5 56/17	
something [8]	27/19 28/10 47/11 56/20 57/14 61/1 79/7 85/23	
sometimes [1]	55/25	
somewhere [2]	24/3 75/19	
sophistication [1]	6/17	
sorry [5]	18/1 32/5 32/22 43/22 66/19	
sort [9]	28/5 28/8 33/3 36/15 43/8 52/7 54/23 56/23 58/23	
sounds [1]	53/17	
source [1]	52/19	
Spanish [3]	80/15 80/23 81/1	
speak [6]	21/2 41/4 46/9 47/9 62/3 81/1	
speakerphone [1]	54/16	
speaking [3]	42/9 77/17 80/23	
special [5]	22/2 64/14 64/21 70/4 82/7	
specialists [1]	37/8	
specific [6]	20/3 21/20 21/20 63/19 64/1 64/19	
specifically [5]	5/6 12/21 31/20 62/16 63/17	
speculative [1]	28/21	
speedier [1]	77/1	
speedy [15]	58/2 58/4 58/6 58/9 58/12 58/15 58/18 59/3 59/5 59/8 59/9 59/16 60/5 60/13 60/18	
Spence [2]	13/23 59/17	
spend [1]	81/20	
spent [2]	14/16 30/23	
spin [1]	81/21	
spoke [6]	30/1 41/3 41/21 42/18 51/22 80/15	
spotted [1]	46/7	
stage [4]	4/19 73/6 77/15 79/25	
stages [1]	13/24	
stamp [1]	84/2	
stand [1]	55/14	
standard [8]	15/7 21/17 21/19 30/5 58/17 66/10 69/9 69/24	
standing [2]	35/3 74/15	
start [1]	62/7	
started [1]	15/19	
starting [1]	11/23	
starts [1]	54/12	
state [50]	1/4 2/7 3/16 3/18 4/9 4/20 7/16 7/17 9/4 9/6 9/10 9/12 10/17 10/18 10/23 12/13 12/15 12/16 12/22 15/16 16/24 22/9 33/10 34/2 34/14 36/18 49/8 49/19 50/11 51/20 52/5 54/12 54/17 55/1 59/23 64/12 65/12 65/20 68/6 68/11 71/2 73/25 75/12 81/10 82/18 82/23 87/24 89/4 90/1 90/4	
State's [26]	4/4 5/1 10/20 10/21 11/1 11/2 13/5 13/22 14/3 14/13 14/16 14/20 15/17 15/21 15/21 16/20 34/7 51/6 51/20 52/16 65/21 70/15 71/4 72/12 89/7 89/15	
stated [4]	10/22 23/1 23/13 74/13	
statement [8]	6/3 8/7 8/13 10/24 11/4 30/21 68/24 69/12	
statements [7]	9/21 11/4 12/9 14/2 26/11 49/9 77/24	
states [3]	41/15 59/4 68/17	
stating [1]	5/22	
statute [1]	58/8	
statutory [1]	69/25	
stay [1]	23/22	
Ste [1]	2/16	
stereotype [1]	1/18	
stepfather [1]	63/1	
still [7]	9/7 9/8 15/20 23/11 43/14 54/15 75/7	
stood [1]	66/6	
stops [1]	76/24	
strategic [4]	51/1 53/5 60/11 71/10	
strategy [6]	40/10 42/23 42/24	
00/2 64/15 70/18		
stream [1]	15/3	
stressing [2]	19/21 38/22	
Strickland [2]	64/24 64/25	
strike [1]	31/18	
strongest [5]	48/3 48/5 79/21 80/13 81/19	
struck [1]	31/14	
struggle [1]	39/1	
stuck [1]	78/24	
study [1]	75/2	
stuff [1]	84/16	
styled [1]	90/10	
subjected [1]	49/5	
submit [2]	34/2 34/3	
submitted [7]	5/5 7/1 12/2 74/9 76/12 76/14 78/16	
subpoena [3]	34/14 45/21 78/8	
substitute [2]	73/19 77/21	
succinctly [5]	10/3 10/5 11/19 29/12 53/10	
such [1]	49/6	
sufficient [2]	5/23 72/1	
suggestive [7]	31/6 31/8 44/18 44/23 44/25 45/10 45/12	
summarize [4]	7/13 26/8 39/17 53/10	
summarizing [1]	8/23	
summary [4]	14/3 18/12 18/14 22/4	
summation [2]	57/7 84/20	
supplement [1]	79/4	
support [1]	78/4	
supported [1]	39/14	
supports [2]	57/6 64/4	
supreme [2]	59/7 82/22	
sure [14]	5/20 6/14 7/14 14/25 18/10 18/22 26/10 27/15 29/11 43/7 47/21 56/3 62/4 84/11	
surprised [2]	15/10 87/9	
surrounding [2]	9/15 12/6	
switch [1]	54/13	
system [2]	23/13 37/10	
T		
tactic [1]	56/24	
tag [1]	81/8	
tainted [1]	22/14	
take [14]	7/23 11/25 32/24 34/25 35/1 35/7 54/14 57/23 59/21 62/4 73/10 74/17 75/1 82/7	
taken [4]	5/15 12/14 15/6 62/6	
takes [1]	75/4	
taking [1]	77/7	
talk [3]	7/25 47/9 80/14	
talked [1]	77/23	
talking [13]	5/10 16/9 22/1 25/17 28/14 41/11 44/23 47/12 55/18 62/19 69/2 74/12 85/20	
talks [1]	54/4	
team [7]	15/14 37/12 38/1 41/5 46/10 46/13 54/24	
technical [3]	54/13 54/15 55/2	
Telephone [3]	2/7 2/17 90/22	
tell [14]	3/8 16/11 17/22 18/25 26/18 28/13 34/16 45/8 83/22 84/17 84/21 86/10 86/11 89/3	
telling [6]	8/20 38/24 54/9 55/10 57/13 81/3	
tells [1]	15/15	
ten [3]	37/24 89/9 89/11	
Tercera [1]	36/13	
terminated [2]	66/1 66/22	
termination [1]	67/8	
terms [2]	13/21 50/4	
testified [15]	7/16 10/25 30/16 41/18 41/23 51/11 51/22 53/19 54/1 59/17 65/23 66/13 66/20 66/24 67/2	
testify [18]	31/13 31/19 31/21 32/3 39/7 40/8 41/1 42/6 42/14 42/16 49/16 49/22 51/19 52/17 54/10 55/4 55/5 84/19	
testifying [3]	41/14 52/1 52/18	
testimony [36]	4/5 7/15 7/18 8/2 9/5 9/8 9/13 10/16 14/22 15/11 27/12 28/11 41/9 41/10 41/25 46/21 48/19 48/20 50/17 52/7 55/11 55/15 55/16 65/21 66/3 66/7 66/11 67/6 67/13 67/14 67/14 67/16 73/19 77/12 77/22 78/5	
TEXAS [15]	1/4 1/5 1/17 1/22 1/23 2/6 2/7 2/17 25/8 58/7 90/1 90/5 90/19 90/21 90/22	

T			
than [17]	5/15 5/17 16/6 16/19	thing [4]	32/11 44/15 45/5 78/13
25/20 35/12 50/19 51/13 62/22		things [16]	27/16 27/24 29/2
65/11 65/15 71/11 74/8 77/2 82/13		33/17 33/22 45/17 45/24 46/5	
82/17 86/5		52/20 66/25 75/11 76/25 81/6 81/6	
Thank [12]	3/25 18/24 35/5 35/8	81/15 85/21	
48/6 57/25 62/2 65/13 65/18 89/18		think [42]	4/17 14/11 15/4 15/25
89/20 89/21		16/15 16/17 21/11 21/13 22/4	
that [601]		24/18 24/19 26/3 26/6 26/16 34/19	
that's [46]	3/17 5/2 5/17 10/20	34/19 36/17 36/22 41/16 43/22	
11/20 12/3 13/15 14/21 15/22		44/24 45/6 45/15 47/16 47/22 48/2	
18/20 21/12 21/12 22/4 26/6 27/9		48/4 52/9 53/2 56/11 56/12 58/7	
27/22 32/17 34/19 35/21 43/25		65/19 78/22 79/19 84/1 84/6 84/10	
44/8 46/2 46/21 57/13 57/20 59/11		84/19 85/18 86/12 87/14	
63/6 66/4 66/5 69/17 71/3 71/11		thinking [3]	21/15 26/19 45/8
72/2 76/22 77/1 78/3 78/15 79/12		thinks [2]	76/18 84/7
79/13 79/14 80/11 82/5 83/20		third [2]	11/24 82/3
85/18 87/7 89/14		this [121]	
their [67]	4/13 6/5 9/19 11/7	thorough [2]	15/12 57/6
12/15 13/2 15/5 17/21 19/22 19/23		thoroughly [2]	7/4 46/3
20/21 21/4 21/20 22/9 22/25 23/5		those [52]	4/21 6/15 9/11 9/15
23/17 26/12 27/15 28/20 29/17		9/19 11/5 11/13 11/18 12/23 16/25	
29/21 30/6 30/9 30/11 32/1 32/2		17/7 20/15 21/4 21/22 21/23 29/24	
37/25 41/5 41/5 42/19 43/14 46/9		29/25 33/17 34/21 38/23 40/3 44/6	
46/19 49/19 51/1 51/24 52/2 52/3		44/6 44/7 46/7 46/16 48/20 49/8	
52/3 52/6 55/8 55/11 55/21 57/2		49/23 49/25 50/23 56/8 62/16 65/7	
60/22 62/11 62/12 63/24 64/5		66/4 70/8 70/9 70/11 71/12 72/11	
64/10 64/11 64/15 64/21 65/6 65/6		74/11 74/12 74/17 75/1 75/13	
67/22 70/24 71/17 82/7 84/3 84/4		75/14 78/18 78/21 79/21 83/14	
84/9 85/12 85/14 86/5 87/12		83/16 86/22	
theirs [1]	84/24	though [6]	8/25 54/25 57/3 61/6
them [63]	6/22 6/22 7/2 7/3 7/4	69/14 83/9	
7/12 10/4 15/7 15/8 17/10 17/20		thought [6]	21/1 52/25 53/1 57/1
19/21 20/17 26/19 28/7 30/1 31/22		69/11 80/22	
34/25 35/1 35/25 38/20 38/25 39/4		thousands [1]	82/5
39/10 40/10 41/4 46/4 46/4 47/22		threatened [1]	19/22
52/12 53/6 53/10 53/11 54/6 54/9		three [1]	35/16
55/4 55/4 55/10 55/14 55/24 61/6		through [18]	7/6 7/9 7/12 29/12
61/10 61/19 65/6 65/7 65/16 68/6		30/3 36/20 40/21 40/25 41/5 42/1	
68/7 71/1 72/1 72/8 74/20 75/2		42/3 50/15 51/7 55/1 72/3 72/10	
76/19 77/14 79/6 80/9 81/14 81/15		75/6 78/16	
81/23 84/2 84/22 85/1		throughout [1]	64/19
themselves [4]	6/6 41/4 42/19	throw [2]	46/20 85/7
54/7		thwart [1]	38/4
then [31]	4/16 16/3 17/18 19/7	tied [1]	36/14
19/23 21/25 31/3 32/10 34/21		time [38]	3/2 7/4 8/1 8/6 11/25
39/16 46/18 49/19 58/18 58/21		12/18 12/22 14/15 22/8 24/5 24/22	
58/22 65/10 65/10 67/6 67/9 71/23		30/8 30/15 30/23 32/24 32/25	
73/12 73/18 73/23 76/3 76/19 79/6		33/25 34/4 39/11 46/3 48/9 57/21	
80/12 84/16 84/20 85/1 85/12		57/23 58/2 60/15 65/12 65/17	
theory [1]	15/22	78/19 79/7 80/18 81/4 81/12 82/21	
there [83]	5/25 7/11 8/13 13/22	86/15 87/6 87/15 88/3 89/19	
19/18 20/1 20/19 23/14 23/21		times [2]	12/15 51/23
25/21 25/23 27/17 28/6 28/12		timetable [4]	77/1 87/11 88/19
29/18 31/16 34/23 35/3 35/12		89/7	
35/16 35/24 36/3 36/12 36/14		titled [1]	1/14
36/18 36/23 37/11 37/13 37/16		today [10]	72/19 72/23 72/24 74/1
41/16 41/17 42/16 43/8 43/17		74/15 75/6 79/4 79/7 81/11 81/20	
43/21 49/5 51/6 51/14 53/5 53/7		together [6]	8/14 18/14 19/7
53/8 53/11 53/18 53/19 55/4 55/19		59/20 88/4 88/16	
56/13 57/13 58/18 58/21 59/1 60/6		told [10]	8/6 8/8 38/19 39/5
60/20 61/16 64/17 64/18 66/10		41/20 42/7 47/11 47/11 69/15	
66/19 68/3 70/21 70/23 72/21		79/19	
72/24 73/23 73/24 74/3 75/7 75/11		too [2]	48/23 61/13
75/21 76/3 77/3 77/7 77/8 77/9		took [6]	14/14 20/21 32/12 56/25
80/6 81/16 81/16 82/1 82/4 83/23		57/2 59/22	
86/12 88/14 89/7		top [2]	52/2 64/7
there's [19]	11/13 15/3 16/1	total [2]	36/4 36/17
26/14 28/13 28/14 28/17 43/23		totality [1]	64/20
54/13 54/15 54/18 54/22 58/20		touch [1]	17/4
66/7 67/10 71/2 75/10 75/12 85/21		touches [1]	62/20
therefore [2]	13/3 62/12	touching [1]	62/23
these [88]	4/4 4/15 5/14 6/4 6/7	towards [1]	28/9
6/21 9/25 12/14 12/16 12/21 13/7		town [3]	19/11 23/21 23/24
14/1 14/8 14/11 14/12 14/17 14/21		Traci [2]	11/1 14/6
15/2 16/10 17/14 17/23 20/3 20/24		traffic [1]	48/10
21/19 22/16 25/12 27/23 28/6		trained [3]	80/18 80/19 80/20
28/19 29/2 29/11 29/12 31/23 33/4		transcript [3]	13/10 13/10 16/8
33/22 36/15 38/11 39/15 45/19		transcription [1]	90/6
45/22 46/1 49/13 51/8 51/20 51/21		translating [1]	54/18
52/1 52/6 52/10 52/10 52/10 52/18		translation [1]	80/16
52/20 52/21 52/25 52/25 53/3 54/5		translator [10]	54/18 54/20 80/17
55/3 55/8 55/22 55/23 57/10 57/19		80/19 80/21 80/24 80/25 81/2 81/4	
59/24 61/2 61/5 61/19 61/23 62/13		81/22	
71/8 72/3 73/10 73/23 74/4 74/9		translators [2]	80/14 81/1
74/24 76/2 76/4 76/5 76/8 76/17		traveled [1]	50/25
76/21 77/5 77/18 79/7 81/12 81/22		trial [110]	
82/8		tried [1]	55/14
they [172]		trouble [2]	38/11 53/18
they're [13]	25/14 36/23 49/10	true [3]	4/15 83/20 90/6
49/17 53/4 61/6 63/12 68/1 69/24		truly [1]	90/14
70/20 80/23 84/25 86/12		try [3]	29/13 47/24 59/20
they've [6]	6/12 15/20 39/9 43/13	trying [9]	8/22 17/22 24/3 34/16

6/15 45/8 53/10 63/19 65/17	
turned [4]	9/10 9/20 12/12 37/13
twice [1]	31/25
two [15]	5/14 6/15 11/19 11/20
11/21 12/23 17/24 19/23 19/24	
36/1 55/3 85/20 87/25 88/1 88/6	
type [2]	12/20 87/11
types [6]	6/4 6/21 12/21 25/12
64/1 71/8	
U	
ultimate [1]	42/14
ultimately [4]	40/17 54/9 54/16
55/1	
unavailable [1]	60/20
unaware [2]	23/16 50/20
unclear [1]	32/6
unconstitutionally [1]	70/3
uncooperative [1]	38/2
under [10]	9/1 9/3 12/7 26/10
29/5 63/13 63/14 64/24 72/7 75/4	
understand [9]	8/16 12/3 20/6
35/22 74/18 79/2 79/3 80/2 85/24	
understanding [3]	27/13 63/25
85/12	
understood [2]	9/18 80/23
unfavorable [1]	38/1
unit [1]	17/4
United [1]	68/17
unknowingly [1]	10/18
unless [2]	25/11 56/17
unreasonable [1]	30/10
unstable [1]	51/17
until [7]	4/13 23/16 25/5 31/3
39/3 48/9 60/13	
unusual [1]	68/17
up [22]	9/13 10/10 20/20 24/6
24/18 30/25 34/9 35/3 35/7 35/9	
36/16 46/7 48/21 49/5 52/23 58/12	
59/22 61/13 71/9 72/17 76/6 88/13	
upon [4]	17/15 20/22 25/14 47/13
upset [2]	70/20 70/25
urge [3]	5/2 57/4 77/13
urging [1]	38/20
us [19]	3/8 12/12 13/2 18/17
18/25 32/6 33/22 33/25 52/12	
57/16 58/10 74/10 78/19 79/1	
85/14 87/4 87/25 88/2 89/13	
usable [1]	39/13
use [9]	16/15 30/12 40/24 54/16
54/16 66/25 73/17 79/6 80/12	
used [7]	9/22 14/18 31/5 33/4
36/24 50/23 81/2	
useful [2]	40/23 52/9
uses [2]	58/19 80/20
V	
vacated [1]	70/6
vague [1]	70/3
valid [2]	52/25 57/1
various [5]	12/15 29/9 38/17 40/5
40/13	
verbal [1]	87/9
verbatim [1]	34/7
verbose [1]	79/15
verdict [15]	4/14 20/1 20/8 20/19
20/21 20/21 21/7 21/8 21/20 23/1	
23/6 26/12 27/21 57/2 83/15	
versus [1]	79/25
very [11]	6/17 7/9 10/3 12/4
19/21 29/11 29/15 29/18 48/5 57/6	
89/18	
via [3]	53/19 54/11 59/4
viable [1]	23/21
vickie [1]	23/12
videos [2]	51/25 52/10
views [1]	65/6
violated [2]	68/13 68/20
violates [1]	68/16
violation [5]	49/15 58/20 58/21
60/16 66/23	
visit [1]	38/17
voice [1]	72/16
voir [4]	59/9 63/16 63/25 64/11
volume [6]	1/1 44/4 44/5 44/8
44/8 90/9	
VOLUMES [1]	1/1
voluminous [1]	59/18
vote [4]	22/2 68/21 69/3 69/16
voted [1]	21/10
votes [1]	28/22
vouchers [1]	37/12

W
 waiver [1] 13/3
 walter [1] 41/6
 want [36] 5/10 5/18 6/11 8/17
 10/8 13/19 18/8 19/5 21/13 25/25
 26/18 27/14 34/21 34/22 35/2 37/4
 38/15 38/16 39/7 40/8 41/1 44/1
 44/14 47/8 47/17 53/10 56/16 61/2
 78/7 79/20 80/2 84/6 84/15 84/17
 86/9 86/10
 wanted [15] 10/2 10/3 36/7 40/9
 41/12 42/5 46/6 54/4 55/2 55/3
 56/19 57/1 69/17 80/12 84/2
 wants [2] 15/1 39/6
 warrants [1] 83/18
 was [196]
 wasn't [6] 8/8 19/13 36/11 49/13
 64/7 67/15
 watch [1] 40/9
 waving [5] 19/15 20/10 20/11
 26/19 81/22
 way [12] 15/11 20/4 21/10 22/2
 24/15 28/13 28/13 40/24 54/10
 74/7 82/9 83/11
 ways [1] 73/4
 we [164]
 we'd [2] 28/4 74/16
 we'll [4] 10/6 82/24 86/12 87/5
 we're [25] 3/7 5/22 11/3 11/5
 18/6 22/1 25/17 28/25 45/20 46/2
 47/5 47/7 73/6 78/5 78/16 78/24
 78/25 82/23 83/3 83/6 85/20 85/22
 88/16 88/18 89/5
 we've [10] 4/1 7/1 29/8 63/6
 72/23 73/6 75/5 75/11 77/23 80/17
 weakened [1] 17/23
 weapon [3] 66/13 66/16 66/19
 week [3] 31/3 84/4 87/24
 weeks [1] 88/2
 weigh [1] 58/19
 weight [1] 64/3
 welcome [1] 35/4
 well [32] 6/12 10/20 11/1 17/9
 21/6 32/15 35/15 39/15 41/13
 41/15 42/19 46/24 48/2 50/18 52/8
 52/15 53/5 54/3 54/19 54/21 55/6
 58/11 59/25 71/4 73/12 79/6 79/9
 79/18 80/11 81/18 82/22 85/23
 Wendy [1] 42/4
 Wendy's [1] 42/15
 went [1] 24/15
 were [106]
 weren't [2] 53/3 80/8
 Westchase [2] 24/12 24/13
 Westfield [1] 24/11
 what [94]
 what's [5] 4/17 24/9 36/22 78/24
 89/15
 whatever [4] 19/15 35/1 46/14
 89/1
 whatnot [1] 60/2
 wheels [2] 81/21 81/21
 when [41] 4/12 6/4 12/7 12/19
 20/14 22/8 22/9 23/20 30/20 30/25
 33/18 33/23 33/25 39/4 41/15
 41/17 41/21 41/23 42/18 43/5 43/7
 44/9 49/1 52/14 55/5 56/5 57/4
 60/9 60/13 62/20 64/10 64/23
 65/21 67/5 67/12 67/13 67/16
 68/20 72/19 86/2 88/16
 where [24] 9/9 9/13 11/16 12/5
 20/23 24/5 26/6 29/16 31/15 34/16
 44/11 44/12 45/21 49/25 58/3
 62/10 73/15 75/11 78/10 78/14
 79/24 79/25 80/7 88/15
 whether [15] 10/17 22/12 30/5
 31/6 35/25 42/16 44/3 55/21 58/19
 59/23 63/17 64/8 66/11 71/20
 75/10
 which [38] 6/2 14/3 14/5 16/18
 17/14 17/25 18/7 18/14 19/8 20/25
 21/18 25/12 26/14 28/9 29/4 29/20
 38/1 38/2 38/2 38/3 40/1 42/21
 47/3 48/17 51/7 64/14 66/25 67/7
 67/15 73/7 73/20 73/25 76/18
 77/16 77/20 77/23 89/12 90/10
 while [3] 5/10 13/5 27/16
 who [33] 3/8 3/15 5/18 7/15 10/22
 13/23 14/7 14/7 16/12 17/2 20/24
 23/12 23/13 29/23 30/15 30/23
 30/25 31/1 32/12 32/14 38/6 52/19
 54/7 54/18 60/18 64/2 65/22 68/24
 69/7 70/24 71/2 84/18 86/11

who's [1] 34/15
 whoever [3] 15/6 17/1 41/4
 whole [2] 36/18 88/8
 whom [1] 14/10
 why [10] 7/8 12/3 23/13 27/22
 31/16 32/7 45/20 46/2 72/11 78/3
 wife [1] 37/19
 will [21] 7/3 15/1 18/22 35/2
 37/6 44/2 47/24 48/4 57/18 61/6
 76/4 79/6 80/21 81/3 85/10 85/12
 85/15 85/16 85/16 86/22 87/24
 Willowbrook [1] 24/20
 window [1] 88/3
 Wingo [1] 59/7
 withheld [2] 4/9 13/21
 within [6] 9/10 19/25 30/11 32/10
 60/7 74/2
 without [5] 31/23 32/9 52/7 52/22
 65/7
 witness [11] 31/19 41/6 42/5
 44/10 44/22 47/9 65/22 66/12 78/9
 78/12 90/16
 witness' [3] 67/13 67/16 78/10
 witnesses [40] 4/4 12/21 29/23
 29/25 30/2 30/14 32/12 32/13 38/2
 39/9 39/10 40/6 42/3 48/19 50/12
 50/15 50/16 50/23 51/10 51/21
 51/21 52/21 52/22 53/19 53/20
 54/7 54/10 54/13 54/14 54/15 55/3
 55/8 55/10 55/12 60/20 60/20
 73/21 74/6 84/18 86/11
 woman [1] 39/6
 won't [1] 87/25
 word [3] 56/6 56/18 81/2
 worded [1] 49/10
 words [1] 56/1
 work [6] 12/24 12/25 13/14 54/10
 82/23 82/25
 working [2] 17/3 80/24
 workings [1] 71/24
 works [1] 61/5
 worse [2] 6/4 71/11
 worthy [2] 11/14 53/2
 would [97]
 wouldn't [2] 46/10 47/13
 writ [9] 1/10 4/1 28/20 37/25
 38/14 53/8 72/9 76/1 76/17
 writing [7] 74/23 75/3 75/19
 79/10 81/10 88/22 90/8
 writs [5] 2/16 3/11 3/14 82/8
 89/6
 written [9] 6/3 74/23 75/3 79/11
 79/13 81/12 85/3 85/16 85/17
 wrongdoing [1] 67/3

9/21 80/13 81/18 81/20 81/21
 84/17 84/18 84/23 85/2 85/16
 85/17 85/21 86/11 87/16 88/19
 89/15 89/19 89/20
 yours [1] 84/25
 yourselves [1] 3/7

Y
 y'all [5] 36/22 78/22 87/8 88/5
 88/17
 Yancy [1] 38/18
 Yeah [2] 50/5 85/5
 year [2] 30/24 58/17
 years [7] 9/12 30/16 36/19 59/22
 62/20 62/24 81/24
 yes [40] 3/4 3/23 5/13 6/10 10/12
 18/6 20/11 21/6 24/23 25/3 25/23
 28/23 32/18 34/22 34/24 36/5
 37/20 38/9 42/24 44/21 47/20
 47/21 50/8 54/22 57/8 59/15 62/8
 62/23 63/5 63/22 68/9 69/4 69/21
 69/22 72/1 79/2 82/19 85/18 86/7
 88/25
 yesterday [1] 17/15
 yet [2] 32/20 51/23
 York [1] 50/25
 you [220]
 you'd [2] 10/1 53/16
 you'll [3] 48/10 84/21 85/2
 you're [18] 5/10 6/8 7/10 18/7
 23/18 25/21 27/16 35/4 47/12
 47/18 57/16 58/11 68/25 71/9
 74/12 79/5 79/16 79/17
 you've [3] 9/5 35/3 79/20
 you-all [1] 87/10
 young [2] 49/4 49/7
 your [70] 3/3 3/9 3/21 3/25 9/24
 10/1 10/9 11/25 17/9 17/13 17/17
 19/3 19/12 21/7 21/9 27/22 28/24
 29/7 30/13 32/24 33/18 34/11 35/5
 37/20 38/9 46/25 47/7 48/3 48/3
 48/6 48/13 49/24 57/9 57/15 57/23
 58/12 58/21 59/1 60/25 61/11 62/2
 62/8 62/23 63/5 63/10 63/11 67/25
 72/14 72/18 79/4 79/17 79/19